No. 383

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TRANSCRIPT OF RECORD

IN THE

United States Court of Appeals

FIFTH CIRCUIT

NO. 16,314

UNITED STATES OF AMERICA,
Appellant - Appellee,

VERSUS

DAVID CENTER, ET AL.,
Appellees - Appellants,

(AND REVERSE TITLE)

Appeals from the United States District Court for the Northern District of Georgia.

U. S. COURT OF APPEALS
FILED
NOV 21 1956

(ORIGINAL RECORD RECEIVED SEPT. 28, 1956)

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 16,314

UNITED STATES OF AMERICA *Appellant* vs. DAVID CENTER, ET AL *Appellees and Cross Appellants*	CIVIL ACTION **NO. 4294**

TRANSCRIPT OF RECORD

Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.

JAMES W. DORSEY, United States Attorney, Atlanta, Georgia

CHARLES D. READ, JR., Assistant United States Attorney, Atlanta, Georgia

Attorneys for Appellant

COHEN, ROBERTS & KOHLER, ESQS., 1310 First National Bank Building, Atlanta, Georgia

Attorneys for Appellee and Cross-Appellants

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IN THE UNITED STATES DISTRICT COURT
for the
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA, *Plaintiff* v. DAVID CENTER ROBERT ROBBINS ASSOCIATED ALUMINUM & METALS COMPANY, also known as ASSOCIATED METALS and as ASSOCIATED METALS COMPANY, a copartnership consisting of DAVID CENTER and ROBERT ROBBINS S. P. BENAMY JOSEPH BENAMY SHOWER DOOR COMPANY OF AMERICA, a Georgia corporation, SHOWER DOOR COMPANY OF AMERICA, LIMITED, a partnership, consisting of ROBERT ROBBINS as general partner, and other persons as limited partners, *Defendants.*	CIVIL ACTION NO. 4294

COMPLAINT FOR GOODS SOLD AND DELIVERED AND FOR BREACH OF CONTRACT.

1. Plaintiff the United States of America brings this action by the United States Attorney for this District.

This Honorable Court has jurisdiction by virtue of 28 U.S.C. 1345.

2. Defendant Associated Aluminum & Metals Co., also known as Associated Metals and as Associated Metals Company, was, at the time of the transactions hereinafter described, a copartnership consisting of two general partners, to wit, defendant David Center and defendant Robert Robbins. The principal place of business of said partnership was in Atlanta, Georgia.

3. Defendants S. P. Benamy, Joseph Benamy, David Center and Robert Robbins are individuals residing in Atlanta, Georgia.

4. Shower Door Company of America is a corporation organized under the laws of the State of Georgia, which at all times relevant hereto maintained its principal place of business in Atlanta, Georgia. Shower Door Company of America, Limited, is a limited partnership consisting of defendant Robert Robbins as general partner and various limited partners whose names and identities are unknown to the plaintiff; and said limited partnership has its principal place of business in Atlanta, Georgia.

5. Defendants S. P. Benamy and Joseph Benamy guaranteed payment by Associated Aluminum & Metals Co. of all the latter's obligation to War Assets Administration, an agency of the United States.

6. All liabilities of defendant Associated Aluminum & Metals Co., were assumed by defendant Shower Door Company of America, and later were assumed by defendant Shower Door Company of America, Limited.

FIRST COUNT

7. Defendant Associated Aluminum & Metals Co., made the following purchases from War Assets Administration, an agency of the United States, and duly received delivery of the merchandise:

Sales Document No.	Principal Amount	Due Date
2181279	$ 45.01	Nov. 16, 1946
2182305	9.10	Dec. 14, 1946
2182102	40.97	Dec. 26, 1946
2181185	6.02	Jan. 2, 1947
Total	$101.10	

The above liabilities bear interest at 4% from the due dates above recited.

8. Payment of the aforesaid liabilities has been demanded, but no part thereof has been paid.

SECOND COUNT

9. An agent acting for defendant Associated Aluminum & Metals Co., purchased aluminum sheet on Sales Document No. 144766, dated January 24, 1946, from War Assets Administration. Said agency shipped the merchandise as agreed in said document, and inadvertently made an overshipment of 961 pounds, having a value of $213.35.

10. Said defendant received and accepted said overshipment on May 9, 1946, but refused to make payment therefor, although payment has been demanded.

THIRD COUNT

11. Defendant Associated Aluminum & Metals Co., made the following purchases from War Assets Administration, and duly received delivery of the merchandise:

Sales Document No.	Principal Amount	Date of Sale
2262352	$ 1,686.24	Jan. 6, 1947
2262349	5,036.78	Jan. 6, 1947
2262353	1,835.26	Jan. 8, 1947
2666097	22,007.32	Jan. 24, 1947
2666098	7,966.05	Jan. 24, 1947
Total	$38,531.65	

12. Plaintiff concedes that said defendant is entitled to various credits in regard to the transactions recited in paragraph (11) hereof, and said credits reduce the liability of said defendant on said transactions to $28,084.04. Plaintiff further concedes to said defendant a credit of $116.14 based upon Sales Document No. 2254001, dated August 14, 1946.

13. Defendant Associated Aluminum & Metals Company, by virtue of the facts hereinabove alleged in paragraphs (11) and (12), owes the plaintiff a balance of $27,967.90, and no part of said balance has been paid, although payment has been demanded.

FOURTH COUNT

14. Defendant Associated Aluminum & Metals Company agreed to purchase a quantity of alloy aluminum sheets from War Assets Administration, for $16,613.92.

Said agreement was recorded in Sales Document No. 1663730 dated February 5, 1947.

15. Said agreement incorporated conditions of sale which specified that drop shipments would not be made in less-than-carload lots. Said defendant nevertheless demanded that the merchandise be delivered by drop shipments of less-than-carload lots. When War Assets Administration refused to carry out said shipping instructions, the said defendant repudiated its agreement to purchase said merchandise.

16. Following said repudiation, and acting pursuant to the terms of the agreement of the parties, War Assets Administration resold said merchandise at the best available price. Said resale was to Kaplan Metals Co., Richmond, Virginia, for $13,085.15, and was effected on November 4, 1947.

17. The aforesaid breach of contract by defendant Associated Aluminum & Metals Co., damaged the plaintiff in the amount of $3,528.77, and the said defendant is indebted to the plaintiff in said amount. No part of said obligation has been paid, although payment has been demanded.

WHEREFORE, the plaintiff prays judgment against all of the defendants, jointly and severally, as follows:

A. On the First Count, for $101.10, plus interest on each item at 4%, from the due dates of the various items.

B. On the Second Count, for $213.25, together with

interest thereon from May 9, 1946, at the rate prescribed by the laws of Georgia.

C. On the Third Count, for $27,967.90, plus interest on each sale price from the date of the pertinent Sales Document, at the rate prescribed by the laws of Georgia.

D. On the Fourth Count, for $3,528.77, plus interest thereon from November 4, 1947, at the rate prescribed by the laws of Georgia.

E. On all counts, for the costs of this action, and for such other and further relief as may be just and proper.

J. ELLIS MUNDY,
United States Attorney

H. A. STEPHENS, JR.,
Assistant United States Attorney

COUNSEL FOR PLAINTIFF

Date: March 7, 1952.

Filed March 7, 1952.

ANSWER
FIRST DEFENSE

The defendants in the above stated matter, answering the complaint, allege:

— 1 —

Defendants admit the allegations contained in paragraphs 1, 2, 3, 4 and 5 of the complaint.

— 2 —

Defendants deny the allegations contained in paragraph 6 of the complaint.

— 3 —

In answer to paragraph 7 of the First Count of the complaint defendants say that until an accounting can be had of their great volume of transactions with War Assets Administration that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 of the first count of the complaint but strict proof thereof is demanded.

— 4 —

Paragraph 8 of the first count of the complaint is admitted.

— 5 —

Paragraph 9 and 10 of the Second Count of the complaint are denied.

— 6 —

Until an accounting can be had of the great volume of transactions between defendants and War Assets Administration, defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 11, 12 and 13 of the Third

Count of the complaint, except that defendants admit that payment has been demanded and payment has not been made. Strict proof of the other allegations of said paragraph are demanded.

—7—

Defendants admit paragraph 14 of the Fourth Count of the complaint.

—8—

Defendants deny the allegations of Paragraph 15 of the Fourth Count of the complaint and say that War Assets Administration refused to deliver said alloy aluminum sheets without any reason therefor and damaged defendants by so doing as hereinafter set out.

—9—

In answer to paragraph 16 of the Fourth Count of the complaint defendants deny that the resale of the merchandise was pursuant to the terms of the agreement of the parties. In answer to the other allegations of said paragraph defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegations.

—10—

Defendants deny the allegations contained in Paragraph 17 of the Fourth Count of the complaint, except that they admit payment has been demanded and no part of said sum has been paid.

SECOND DEFENSE

As set off against the claim of plaintiff defendants allege:

—11—

Defendant, Associated Aluminum & Metals Company,

purchased from War Assets Administration, through its Detroit, Michigan office 122,796 pounds of aluminum at a contract price of $25,939.97. This aluminum at the contract delivery date had a fair market value of $35,187.08. Without any legal reason therefor War Assets Administration defaulted on the contracts for this material and refused to make delivery thereon causing defendants herein to be damaged in the sum of $9,247.41.

— 12 —

Defendant, Associated Aluminum & Metals Company, purchased from War Assets Administration, through its San Francisco, California office 541,745 pounds of aluminum. War Assets Administration delivered to Associated Aluminum & Metals Company pursuant to this contract 130,950 pounds of aluminum and then without any legal reason therefor, refused to deliver the balance of the aluminum so purchased. The purchase price of the 410,795 pounds not delivered was $84,658.64 and this aluminum had a fair market value on the contract date of delivery of $106,812.66. Defendants were therefore damaged in the sum of $22,154.02 by this breach of contract by War Assets Administration.

— 13 —

Defendant, Associated Aluminum & Metals Company, purchased 14,996 pounds of aluminum from War Assets Administration through its St. Louis, Missouri office at a contract price of $3,135.66. This aluminum had a fair market value of $4,873.29 on the contract delivery date. Without any legal reason for so doing War Assets Administration refused to deliver the aluminum covered by this contract and in so breaching its contract caused defendants damages in the sum of $1,534.63.

— 14 —

Defendant, Associated Aluminum & Metals Company, purchased 2,191 pounds of aluminum from War Assets Administration, through its Louisville, Kentucky office, at a contract price of $517.08. This aluminum had a fair market value on the contract delivery date of $832.58. War Assets Administration refused to deliver this aluminum without any legal reason for such refusal and this breach of contract caused defendants damage in the sum of $315.50.

— 15 —

Defendant, Associated Aluminum & Metals Company, purchased a quantity of aluminum from War Assets Administration through its Atlanta, Georgia and when this material was delivered War Assets Administration shipped a quantity of material not purchased by Associated Aluminum & Metals Company. Defendants were put to an expense for storing and handling this material in the sum of $344.12.

— 16 —

Defendants have been damaged by the actions of Plaintiff's agents and employees in a total sum of $33,595.68 as hereinbefore set forth, which sum exceeds the amount which defendants could be due the plaintiff even if all the allegations of the complaint are conceded to be true.

— 17 —

Defendants show that they have filed their claims for the above damages with the appropriate administrative agencies of the United States and that they were all denied on February 23, 1950.

That this case involves a long and detailed accounting between the plaintiff and the defendants and should be referred to a master to make such accounting.

Wherefore, defendants, pray that this case be referred to a master for an accounting between the plaintiff and the defendants and that defendants be discharged.

I. T. COHEN

JAMES W. ROBERTS

Defendants' Attorneys

Address:
1303 First National Bank Bldg.
Atlanta, Georgia

Certificate of service omitted

Filed, April 16, 1952

REPLY OF PLAINTIFF TO SET-OFF PLEADED AS SECOND DEFENSE

The United States of America, plaintiff herein, by way of Reply to the Second Defense pleaded in the Answer herein, admits, denies and alleges as follows:

(a) Reply to paragraph 11

Plaintiff admits a preliminary understanding with Associated Aluminum & Metals Company for the sale of a large quantity of aluminum including the 122,796 pounds described in said paragraph. Plaintiff admits that the price of said 122,796 pounds was $25,939.97. Plaintiff admits that said amount of aluminum was not delivered. Plaintiff denies that such failure was without legal reason, and alleges that, by the terms of the agreement, accepted by said defendant, plaintiff expressly reserved the option to withdraw from sale all or any part of said property, without notice, at any time prior to delivery to the purchaser. Plaintiff exercised said option of withdrawal in due time, with regard to said 122,796 pounds. Plaintiff denies that such withdrawal constituted a default and denies that the defendants are entitled to damages in any amount.

(b) Reply to paragraph 12

Plaintiff denies that a binding contract was made to sell to Associated Aluminum & Metals Company 541,745 pounds of aluminum, or any amount approximating 541,745 pounds. Plaintiff admits that it sold and delivered 130,950 pounds to said defendant through the San Francisco Office of War Assets Administration, but plaintiff denies that its failure to deliver an additional 410,795 pounds was without legal reason, in that, as aforesaid, no

binding agreement was reached for the sale and purchase thereof. Plaintiff admits that oral negotiations were entered into with a view to sale of an additional amount of aluminum approximating 400,000 pounds, but plaintiff denies, that said oral negotiations resulted in an agreement, or a sale.

(c) Reply to paragraph 13

Plaintiff is unable to find any record of the transaction alleged in paragraph 13 of the Answer. For want of information, the plaintiff denies all allegations of said paragraph and demands strict proof thereof.

(d) Reply to paragraph 14

Plaintiff is unable to find any record of the transaction alleged in paragraph 14 of the Answer. For want of information, the plaintiff denies all allegations of said paragraph and demands strict proof thereof.

(e) Reply to paragraph 15

Plaintiff admits that Associated Aluminum & Metals Company purchased a quantity of aluminum from War Assets Administration through its office at Atlanta, Georgia, and admits that War Assets Administration made delivery under the agreement of purchase. Plaintiff denies that any of the material shipped was not the material purchased by said defendant. For want of information, plaintiff denies that defendants were put to expense for storing and handling. Plaintiff alleges that if the defendants went to any expense to store and handle any such merchandise, the defendants did so for their own account, and the plaintiff is not liable for any of such expense. If the plaintiff should be held to have delivered

wrong merchandise and to be liable for such error under the pertinent contract, then the defendants will be obliged to account for the proceeds received by them, or any of them, in the resale of such merchandise.

(f) Reply to paragraph 16

Plaintiff denies that the defendants have been damaged by any actions of agents or employees of the plaintiff, in the amount of $33,595.68, or any other amount. Plaintiff admits that said amount exceeds the amount prayed for in the Complaint, exclusive of interest and costs.

(g) Reply to paragraph 17

Plaintiff admits that the defendants filed claims on all transactions described in the Second Defense in the Answer, except the one set forth in paragraph 14; and as to that transaction, the plaintiff says that it has found no record of such a claim. For want of information, the plaintiff denies that a claim was filed on the transaction described in paragraph 14 of the Answer. Plaintiff further alleges that, in every instance of which it has knowledg of the filing of a claim by the defendants, each of such claims was filed long after expiration of the time for filing, as specified in the respective contract upon which each such claim was filed.

(h) Reply to paragraph 18

Plaintiff admits that this case involves a long and detailed accounting and should be referred to a master to make such accounting.

WHEREFORE, plaintiff joins in the prayer for reference to a master, opposes the rest of defendants' prayer,

and prays again for the relief sought in the Complaint herein.

J. ELLIS MUNDY,
United States Attorney

H. A. STEPHENS, JR.,
Assistant United States Attorney.

COUNSEL FOR PLAINTIFF

Date: June 16, 1952

Certificate of service omitted

Filed June 16, 1952

AMENDMENT TO REPLY OF PLAINTIFF TO SET-OFF PLEADED AS SECOND DEFENSE

Now comes plaintiff, United States of America, and with leave of the Court amends its Reply To Set-off Pleaded as Second Defense by adding a paragraph thereto, numbered (i), as follows:

(i) For further defense to claims of set-off set forth in Paragraphs 12 and 15 of Defendants' Second Defense, plaintiff says that any right of action set forth in said paragraphs as claims of off-set did not accrue within six years next before the making of said claims of off-set, as provided by 28 U. S. C., Section 2401.

JAMES W. DORSEY,
United States Attorney.

CHARLES D. READ, JR.,
Assistant United States Attorney.

ORDER

The above amendment read and considered, the same is allowed subject to objections and ordered filed.
This 8th day of June, 1954.

FRANK A. HOOPER,
United States District Judge.

Filed in Clerk's Office June 8, 1954.

F. L. BEERS, Clerk.

J. B. MOORE, Deputy Clerk.

AMENDMENT TO REPLY OF PLAINTIFF TO SET-OFF PLEADED AS SECOND DEFENSE

Now comes United States of America, Plaintiff in the above-styled action, and with leave of the Court amends its Reply to Set-Off Pleaded as Second Defense by adding two paragraphs thereto numbered (j) and (k) as follows:

(j) For other and further defense, Plaintiff shows that the claims of set-off set forth by defendants as their second defense fail to set forth any claim for which relief can be granted.

(k) For other and further defense, Plaintiff shows that the Court lacks jurisdiction over subject matter of the claims of set-off set forth by defendants as their second defense.

JAMES W. DORSEY,
United States Attorney.

CHARLES D. READ, JR.,
Assistant United States Attorney.

ORDER

The above and foregoing Amendment read and considered; same is allowed subject to objections and ordered filed.

This 12th day of March, 1956.

FRANK A. HOOPER,
United States District Judge.

Filed in Clerk's Office March 12, 1956.

F. L. BEERS, Clerk.

J. B. MOORE, Deputy Clerk.

PLAINTIFF'S INTERROGATORIES TO DEFENDANTS

Pursuant to Rule 33, the plaintiff propounds the following interrogatories to the defendants herein:

1. With regard to the transaction described in paragraph (13) of your answer:

(a) State the date of said transaction.

(b) Set forth a copy of the contract involved, in its entirety.

(c) Set forth copies of all correspondence pertinent to said contract or contracts, between the buyer and the seller.

(d) State whether you filed a claim in connection with said alleged breach of contract.

(e) If you did, set forth said claim, and all amendments and supplements thereto, and state the date on which said claim was filed.

(f) If said claim was acted upon, set forth all communications by which you were advised of such action.

2. With regard to the transaction described in paragraph (14) of your answer:

(a) State the date of said transaction.

(b) Set forth a copy of the contract involved, in its entirety.

(c) Set forth copies of all correspondence pertinent to said contract or contracts, between the buyer and the seller.

(d) State whether you filed a claim in connection with said alleged breach of contract.

(e) If you did, set forth said claim, and all amend-

ments and supplements thereto, and state the date on which said claim was filed.

(f) If said claim was acted upon, set forth all communications by which you were advised of such action.

3. With regard to the transaction described in paragraph (14) of your answer:

(a) State the date of said transaction.

(b) Set forth a copy of the contract involved, in its entirety.

(c) Set forth copies of all correspondence pertinent to said contract or contracts, between the buyer and the seller.

(d) State whether you filed a claim in connection with said alleged breach of contract.

(e) If you did, set forth said claim, and all amendments and supplements thereto, and state the date on which said claim was filed.

(f) If said claim was acted upon, set forth all communications by which you were advised of such action.

(g) Describe the material allegedly delivered to you by War Assets Administration.

(h) State whether you ever disposed of said material.

(i) If so, state when, where, to whom, and for what price, you disposed of said material.

J. ELLIS MUNDY,
United States Attorney.
H. A. STEPHENS, JR.,
Assistant United States Attorney.
COUNSEL FOR PLAINTIFF

Service omitted.
Filed July 23, 1952.

Defendant's Answer to Plaintiff's Interrogatories

Now come the defendants and in answer to the interrogatories propounded to them by plaintiff say:

1. With regard to the transaction described in Paragraph 13 of their answer say:

(a) The date of said transaction was April 19, 1946.

(b) A copy of the contract is hereto attached.

(c) Copies of all correspondence which defendants n are able to locate in connection with paid breach of contract are hereto attached.

(d) Defendants filed a claim in connection therewith.

(e) Claim was filed on July 28th and August 11, 1949. Copies of the claims are hereto attached.

(f) Hereto attached is copy of action upon the claims and correspondence related thereto.

2. With regard to the transaction described in Paragraph 14 of defendants' answer, they say:

(a) The date of said transaction was May 14, 1946.

(b) A copy of the contract is hereto attached.

(c) Copies of all correspondence pertinent to said contract which defendants have been able to find are attached hereto.

(d) A claim was filed in connection with said alleged breach of contract.

(e) The claim was filed on July 29, 1949. A copy of the claim is hereto attached.

(f) A copy of the action on said claim is hereto attached.

3. The third paragraph of the interrogatories refers to Paragraph 14 of defendants' answer but we assume that Paragraph 15 of defendants' answer was intended.

(a) The date of said transaction was March 12, 1946.

(b) A copy of the contract involved is attached hereto.

(c) Copies of all correspondence pertinent to said contract which defendants have been able to find is attached hereto.

(d) A claim was filed in connection with said matter.

(e) The claim was filed on May 30, 1946 and a copy of same is attached hereto.

(f) A copy of the action on said claim is hereto attached.

(g) The material delivered to defendants was 15,968 pounds of aluminum 24ST .020" x 36" x 144" whereas we had been sold 15,968 pounds of 24SO .020" x 36" x 144".

(h) The material was disposed of by defendants.

(i) Defendants cannot now find a record of to whom and for what price said material was sold but say that said property was sold under an agreement that the material would be accepted by defendants for another customer and the government would pay the handling charges.

I. T. COHEN,

JAMES M. ROBERTS,

Defendants' Attorneys.

STATE OF GEORGIA
COUNTY OF FULTON

Personally appeared Robert Robbins, one of the defendants in the above stated case, who being duly sworn, says that the facts set out in the foregoing answer to plaintiff's interrogatories are true.

ROBERT ROBBINS.

Sworn to and subscribed before me this 15th day of August, 1952.

LILLIAN L. ROBINSON.
Notary Public, Cobb County, Georgia.

My Commission expires June 2, 1954.

Filed October 14, 1954

STIPULATION

It is hereby agreed and stipulated between parties to this case that plaintiff's interrogatories and answers thereto, which have been filed in this case, may be admitted into and made part of the evidence in this case.

JAMES W. DORSEY,
United States Attorney,

CHARLES D. READ, JR.,
Assistant United States Attorney,
Attorneys for Plaintiff.

I. T. COHEN,
JAMES M. ROBERTS,
Attorneys for Defendants.

ORDER

The parties hereto agreeing, it is ORDERED that the interrogatories filed by plaintiff and the answers filed thereto are admitted into evidence and will be part of the evidence in this case.

This 9th day of February, 1955.

FRANK A. HOOPER,
United States District Judge.

Recorded.

Filed February 9, 1955

PRE-TRIAL ORDER

COUNT ONE: Defendant admits the sales, the purchase price, and the computations alleged in the first count, but contends that the defendant, in violation of agreement between the parties, shipped the goods in less than carload lots and damaged the defendant in the sum of one hundred one dollars and ten cents ($101.10) by virtue of the difference in freight rates.

There is a contention between the parties as to plaintiff's alleged duty to ship only in lots of 30,000 pounds as follows: The Government contends that the conditions of sale are stated in the brochure offering property for sale and identified as Plaintiff's Pre-Trial Exhibit Number 3 which determined the conditions of sale that are applicable, and require that the defendants make application to the War Assets Administrator for an adjustment in price; that such application was made, and that it was denied by the Administrator on the ground that none of the lots on which bids were offered by the defendants contained as much as 30,000 pounds and that this action of the Administrator became final under Special Conditions of Sale, sub-paragraph C.

Defendant contends that its bid submitted pursuant to the brochure (Pre-Trial Exhibit No. 3), its bid being identified as Pre-Trial Exhibit No. 2, stated the following shipping instructions: "30,000 pound cars to 971 Peachtree unless otherwise specified by us." It is the defendants' contention that the acceptance of this bid by the War Assets Administration constituted a contract and that where it was in conflict with the terms and conditions of the brochure, that it superceded the terms and

conditions of the brochure and that the shipping instructions contained therein required War Assets Administration to ship in at least 30,000 pound cars, and that when the goods bought were shipped in less than 30,000 pound cars that the defendant was entitled to take credit for the difference in the less-than-carload rate, and the carload-rate, and therefore the Government is not entitled to recover the $101.10 sued for in Count One.

As to Count One, the plaintiff makes no contention that the defendant ever specified less than carload lots of 30,000 pounds each.

Plaintiff concedes that the difference in freight between carload lots and less than carload lots is the sum of $101.10, the balance plaintiff claims in Count One.

Defendant concedes that the amount of interest claimed in the first count is at the correct basis of 4 per cent.

Defendant's counsel stated at this hearing it was his contention that the plaintiff should at its own expense have concentrated these various less-than-carload quantities of aluminum at one point, and then have shipped the same to the defendant in carload lots.

The plaintiff contends that each lot should have been shipped from its location as shown in the brochure. For illustration, the brochure showed lot number Seven of 9,469 pounds to have been located at Bath, Maine, Lot Number Six of 15,645 pounds in Massachusetts. These two lots, if put together, would still not make a carload of 30,000 pounds. Defendant is contending for the difference between the carload rate and less-than-carload rate on shipments of each particular lot from the point of origin to Atlanta.

Plaintiff has abandoned all claims under Count Two.

Count Three: Defendant admits the correctness of the claims set forth in Count Three, but is relying upon the counterclaims or setoffs contained in Paragraph 11 and subsequent paragraphs of Defendants' answer.

Count Four: Defendant admits the contract as set forth in Paragraph 14 of Count Four. Defendant contends, however, that it directed Plaintiff to make various shipments to various customers of this defendant located at various points, being less than carload lots, and that Plaintiff failed and refused to make such shipments as directed by the Defendant, whereupon the Defendant, upon the basis of Plaintiff's alleged breach of contract, repudiated said contract. Document involved in this issue will be produced at a subsequent hearing.

Defendant admits that Plaintiff resold said merchandise at a price of thirteen thousand eighty-five dollars and fifteen cents as alleged in Paragraph 16 of Plaintiff's complaint, and if Plaintiff is entitled to recover on Count Four, its recovery would be in the amount of three hundred twenty-eight dollars, twenty-seven cents, as alleged.

Pre-trial of this case will be resumed on April 20th, 1953, and prior to that time Counsel will submit briefs on questions of law, including the right of the defendant to set-off against the plaintiff, and as to the question of conflict of laws regarding the contract and damages, and the question of basis of profits in connection with the defendants' set-off.

This 5th day of March, 1953.

FRANK A. HOOPER, Judge
U. S. District Court
Northern District of Georgia

Filed Mar. 5, 1953

PRE-TRIAL ORDER NO. 2

Pre-Trial of the above stated case was resumed on this date, pursuant to the previous order of the Court.

1. The documents covering the sale of the materials involved in Count 4 of the complaint were produced by the plaintiff and given Pre-Trial Exhibits Nos. 4 and 5. These documents are agreed upon as being the documents governing the sale alleged in Count 4.

2. In connection with Paragraphs 11 and 12 of the Defendants' Second Defense, defendants produced two schedules of alleged sales of materials by Associated Aluminum & Metals Company to various purchasers and these schedules were given Pre-Trial Exhibit Nos. 6 and 7. It is agreed that these schedules contain correct tabulations of actual orders held by Associated Aluminum & Metals Company from the purchasers, for the quantities of materials, and for the prices set forth therein. Plaintiff does not, however, admit that the materials embraced in these schedules represent the same materials referred to in Paragraphs 11 and 12 of Defendants' Second Defense, nor that the prices set forth represented the fair market value of such materials, and insist upon strict proof of the damages alleged in said paragraphs.

3. As to the damages sought to be set-off by the Defendants in Paragraphs 13, 14 and 15 of their Second Defense, plaintiff has propounded interrogatories under Rule 33 to which Defendants have made answer under oath, attaching thereto copies of the contracts alleged to have been involved, correspondence in connection therewith, and other information requested. The original of these answers with complete copies of documents attached

are filed with the Clerk. Plaintiff may within thirty (30) days from this date file any additional documents it may desire relative to said transactions.

This April 20, 1953.

FRANK A. HOOPER
United States District Judge

Filed Apr. 20, 1953

BEFORE: Honorable Frank A. Hooper, Judge.
March 5, 1953

APPEARANCES

FOR THE UNITED STATES:

H. A. STEPHENS,
Asst. U. S. Attorney

FOR THE DEFENDANTS:

JAMES M. ROBERTS, Attorney
I. T. COHEN, Attorney

(The above stated case was called for pre-trial hearing, and the following proceedings were had.

THE CLERK: U. S. Exhibit Number 1, photostatic copy of sales document, two pages.

(Marked Pre-trial Exhibit U. S. #1.)

THE CLERK: U. S. Exhibit 2, photostatic copy of sealed bid.

(Marked Pre-trial Exhibit U. S. #2.)

THE CLERK: U. S. Exhibit Number 3, photostatic copy of brochure, 6 pages.

(Marked Pre-trial Exhibit U. S. #3.)

PRE-TRIAL ORDER

In the first count defendant admits the sales, the purchase price, and the computations alleged in the first count, but contends that the defendant in violation of agreement between the parties, shipped the goods in less than carload lots and damaged the defendant in the sum of one hundred one dollars and ten cents ($101.10) by virtue of the difference in freight rates.

There is a contention between the parties as to plaintiff's alleged duty to ship only in lots of 30,000 pounds as follows: The Government contends that the conditions of sale are stated in the brochure offering property for sale and identified as Plaintiff's Pre-Trial Exhibit Number 3 which determined the conditions of sale that are applicable, and require that the defendants make application to the War Assets Administrator for an adjustment in price; that such application was made, and that it was denied by the Administrator on the ground that none of the lots on which bids were offered by the defendants contained as much as 30,000 pounds, and that this action of the Administrator became final under Special Conditions of Sale, sub-paragraph C.

Defendant contends that its bid submitted pursuant to the brochure (Pre-Trial Exhibit #3), its bid being identified as Pre-Trial Exhibit # 2, stated the following shipping instructions: "30,000 pound cars to 971 Peachtree unless otherwise specified by us." It is the defendant's contention that the acceptance of this bid by the War Assets Administration constituted a contract, and that where it is in conflict with the terms and conditions of the brochure, that it superceded the terms and conditions of the brochure and that the shipping instructions con-

tained therein required War Assets Administration to ship in at least 30,000 cars, and that when the goods bought were shipped in less than 30,000 pound cars that the defendant was entitled to take credit for the difference in the less-than-carload rate, and the carload-rate, and therefore the Government is not entitled to recover the $101.10 sued for in Count One.

As to Count One, the plaintiff makes no contention that the defendant ever specified less than carload lots of 30,000 pounds each.

Plaintiff concedes that the difference in freight between carload lots and less than carload lots is the sum of $101.10, the balance plaintiff claims in Count One.

Defendant concedes that the amount of interest claimed in the first count is at the correct basis of 4 per cent.

Defendant's counsel stated at this hearing it was his contention that the plaintiff should at its own expense have concentrated these various less-than-carload quantities of aluminum at one point, and then have shipped the same to the defendant in carload lots.

The plaintiff contends that each lot should have been shipped from its location as shown in the brochure. For illustration, the brochure showed lot number Seven of 9,469 pounds to have been located at Bath, Maine, Lot number six of 15,645 pounds in Massachusetts. These two lots, if put together, would still not make a carload of 30,000 pounds. Defendant is contending for the difference between the carload rate and less-than-carload rate on shipments of each particular lot from the point of origin to Atlanta.

Plaintiff has abandoned all claims under Count Two.

Count Three: Defendant admits the correctness of the claims set forth in Count Three, but is relying upon the counterclaims or setoffs contained in Paragraph 11 and subsequent paragraphs of Defendants' answer.

Count Four: Defendant admits the contract as set forth in Paragraph 14 of Count Four. Defendant contends, however, that it directed Plaintiff to make various shipments to various customers of this defendant located at various points, being less than carload lots, and that Plaintiff failed and refused to make such shipments as directed by the Defendant, whereupon the Defendant, upon the basis of Plaintiff's alleged breach of contract, repudiated said contract. Documents involved in this issue will be produced at a subsequent hearing.

Defendant admits that Plaintiff resold said merchandise at a price of thirteen thousand eighty-five dollars and fifteen cents as alleged in Paragraph 16 of Plaintiff's complaint, and if Plaintiff is entitled to recover on Count Four, its recovery would be in the amount of three hundred twenty-eight dollars, seventy-seven cents, as alleged.

Pre-trial of this case will be resumed on April 20, 1953, and prior to that time Counsel will submit briefs on questions of law, including the right of the defendant to set-off against the plaintiff, and as to the question of conflict of laws regarding the contract and damages, and the question of basis of profits in connection with the defendants' set-off.

This 5th day of March, 1953.

FRANK A. HOOPER, Judge

APRIL 20, 1953

(The above stated cause coming on for pre-trial hearing before the court, documents were marked Pre-trial Exhibits numbers 4 and 5, these documents being the documents governing the sale alleged in count 4.)

(Documents marked Pre-trial Exhibits 4 and 5, being marked for the purpose of identification only.)

(Pre-trial order Number 2 filed.)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

THE UNITED STATES OF AMERICA,
Plaintiff

versus

DAVID CENTER; ROBERT ROBBINS; ASSOCIATED ALUMINUM & METALS COMPANY, et al
Defendants

C. A. 4294

BEFORE: Honorable Frank A. Hooper, Judge.
April 19, 1954.

APPEARANCES

FOR THE UNITED STATES:

CHARLES D. READ, JR.,
Asst. U. S. Attorney

FOR THE DEFENDANTS:

JAMES M. ROBERTS, Attorney
I. T. COHEN, Attorney

(The case of the United States versus David Center, Robert Robbins, Associated Aluminum & Metals Company, et al, was called for trial, and the following proceedings were had.)

THE COURT: All right, gentlemen, you can proceed.

MR. READ: Your Honor, at two previous pre

trials of this case, I believe the matter had boiled down to whether or not there would be any set-off or counter-claim on the defendant's answer and claim of set-off. I would like to introduce into evidence some of the exhibits that had been introduced at the time of the pre-trial.

THE COURT: All right.

MR. READ: And I would also like to point out to Your Honor, if I may, at this time, a couple of cases that I believe the Government had filed in a brief previously in this case, as to what it considered the governing law. The case of the United States against—

THE COURT: Suppose you hold that until we get all the facts in here.

MR. READ: All right, sir.

MR. ROBERTS: If Your Honor please, I was going to request the Court to be allowed to file an additional brief. There are some other cases that I have found.

THE COURT: I'll be glad to welcome them, any additional authorities for either side. Suppose you go ahead and perfect the record on the other matter.

MR. READ: I believe according to the pre-trial, Your Honor, in Count 1 of this complaint, Plaintiff's Exhibit Number 3, and Plaintiff's Exhibit Number 2 at pre-trial had been considered to be governing. I would like to introduce in evidence at this time, Plaintiff's, that is labeled as pre-trial, 2,

THE CLERK: Pre-Trial exhibit 2 becomes Plain-

tiff's Exhibit Number 1. Pre-trial #3 becomes Plf. Ex. #2.

MR. READ: Yes, sir, that is the sealed bid form.

(Plaintiff's Exhibit Number 1 and 2 marked for identification.)

MR. ROBERTS: We have no objection.

THE COURT: Admitted.

(Plf. Ex. #1 and #2 received in evidence.)

MR. READ: Now, further on that count 1, I have four decisions on those sales documents involved in that particular count that I would like to introduce in evidence, these have been certified by the War Assets Administration. These are the administrative decisions on the claims, Mr. Roberts, I believe you probably have copies of those.

MR. ROBERTS: If Your Honor please, I don't have any objection to this, the pleading admits the claims were denied. I really don't think it is material.

THE COURT: I will admit it, gentlemen, when we get through any evidence either side wishes to rule out, I will consider it further. I will admit it at this time.

(Brochure of 6 pages admitted as Plf. Ex. #3.)

MR. READ: Now, according to the pre-trial order number 2, I believe it was agreed that the pre-trial exhibits number 4 and 5 would be governing as to—let's see, before I get to that—

THE COURT: I believe I'll take a recess at this

time and you may get together all your documents that you wish to put in, submit them to Mr. Roberts, and then we can see if there is any objection to any of them.

MR. READ: All right. I thought I had them in order, Your Honor.

THE COURT: That is all right. It is about time for a brief recess, court will recess until further order.

(Recess called at 10:45 A.M.)

AFTER RECESS

THE COURT: All right, you may proceed.

MR. READ: I would like to introduce pre-trial exhibits numbers 4 and 5 as Plaintiff's Exhibits 4 and 5 in the trial.

THE COURT: Admitted.

THE CLERK: They retain the same numbers.

(Plf. Ex. #4 and 5 received in evidence.)

MR. READ: And Plaintiff's pre-trial exhibit number las—

THE CLERK: Number 6.

THE COURT: Admitted.

(Plf. Ex. #6 received in evidence.)

MR. READ: Your Honor, I believe as far as the plaintiff's case, all the rest of it is a matter of law. The plaintiffs had abandoned count 2 of the com-

plaint, and count 3 had been admitted but defendant relied on the set-off. Count 4 is governed by the exhibits 4, 5, and 6, just introduced, and is, I think, primarily a matter of law, so I believe that that is the case as far as the plaintiff is concerned.

THE COURT: All right.

MR. ROBERTS: If the Court please, I would like to introduce pre-trial exhibits 6 and 7.

THE CLERK: Those become *Defendant's exhibits 1 and 2 for the trial, number 6 becomes number 1*; and *number 7 is exhibit number 2 for the defendant.*

MR. ROBERTS: If the Court please, we answered some interrogatories, the original of which has apparently gotten lost somewhere. The clerk's office didn't have a record of it being filed, but I am sure it was filed. Between Mr. Reid and I we have gotten up copies of that, and I would like to have that in the record.

THE COURT: Yes.

THE CLERK: To be admitted as an exhibit?

MR. ROBERTS: Well, it actually is a part of the papers, it was answers to the interrogatories and somehow the original got lost.

(Interrogatories become Defendant's Exhibit 3.)

MR. READ: As to 1 and 2, I believe Mr. Stephens had agreed with Mr. Roberts on those on pre-trial,

but we had not agreed that they were the claims on which Mr. Roberts is going to make proof.

MR. ROBERTS: In the pre-trial the Government did not agree that they were the same material. I will have to offer oral testimony on that. We claim it was the same materials bought and delivered. Mr. Stephens did not admit that, but we admit those were the sales made.

MR. READ: For that purpose we have no objection.

THE COURT: That is defendant's Exhibit number 3.

MR. ROBERT ROBBINS: Having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROBERTS:

Q. Mr. Robbins, in 1946, what business were you in?

A. Warehousing and selling aluminum.

Q. Under what name were you trading?

A. Associated Aluminum and Metals Company.

Q. Did you buy a great deal of material from War Assets Administration?

A. Yes, we did.

Q. While you were in that business? Now did you purchase a large amount of material from the Los Angeles office of War Assets Administration?

A. Yes.

Q. Do you remember approximately how much that was, Mr. Robbins?

A. It was five hundred odd thousand pounds.

Q. Through whom did you purchase that material?

A. We had an agent named Johnson, who was the Johnson Trade Development Company, I think was their trade name. Mark Johnson.

Q. Did you receive delivery of all that material?

A. No, sir.

Q. How much of it was delivered on that order?

A. I don't recall that any was delivered on this initial order.

Q. Had any been? How did you find out they were not going to deliver this material to you, and how long after the original purchase was it that you found out about it?

A. The original purchase was consummated, or closed, made to us either February 22nd or 23rd, of 1946. And it was a couple, I would say March 13th or 14th, that I received a telegram—a telephone call it was some few days before the 15th, because I distinctly remember something that happened. My wife had a baby on the 15th. I remember it was a couple of days before that, that I received a call from Mr. Johnson from Los Angeles telling me that he was in the office of a Mr. Olson, who was some official of the War Assets, and he told me that they had cancelled this purchase, and it was quite a

shock to me, I didn't quite understand him. He repeated it. Then he got Mr. Olsen on the phone to tell me that it had been cancelled.

Q. In the interim period between the time you had bought it and the time you got the notification of the cancellation, had you re-sold this material?

A. Well, immediately upon being informed by Mr. Johnson of the purchase, we began advertising the metal for sale in the American Metal Market which was the prime trade paper for this type of material, and we immediately began selling it.

Q. I'll hand you a paper identified as Defendant's Exhibit Number 2, and ask you if that schedule represents the sales of that material?

A. Yes. Now, this is the, this is a list of the material which we offered, and which we had received orders for.

Q. Well, that's what I mean.

A. Yes.

Q. You had firm orders?

A. That is correct.

Q. And that was the material you were supposed to get from San Francisco?

A. That is correct.

Q. Now, I'll hand you, let's get this identified—

(Defendant's Exhibit #4 marked for identification, surplus Government property.)

Q. I hand you Defendant's Exhibit Number 4, and ask you if that is a catalogue of that material which War Assets issued?

A. Yes, it is.

Q. I'll ask you to turn over in the back and ask you if those, if that schedule there represents the prices which you paid, which you agreed to pay for that material?

A. Yes.

MR. ROBERTS: I would like to introduce Defendant's Exhibit number 4, if the court please.

MR. READ: No objection.

THE COURT: Admitted.

(Deft. Ex. #4 received in evidence)

Q. Did you buy a great deal of material, Mr. Robbins, from the Detroit office of War Assets Administration?

A. Yes, we did.

Q. And did they fail to deliver a large quantity of that material to you?

A. Yes.

Q. Now, I hand you a schedule identified as Defendant's Exhibit number 1, and ask you if that schedule shows the amount that you bought from Detroit, that was not delivered, the price you paid for it, and—

A. You have the record that this was taken from. Yes.

Q. And the last list there, does that represent the

people who agreed to—who you agreed to sell that material to?

A. That is correct.

Q. And the price, at the price which is listed on there?

A. Yes.

Q. Now, I'll hand you the answer to the interrogatories which were filed in this case, and ask you did you buy some material from the Louisville office of War Assets?

A. Yes.

Q. Which they failed to deliver to you?

A. Yes, we did.

Q. And it was resold? I mean you had agreed to resell it to some one?

A. Yes.

Q. And what was your loss when they failed to deliver that material to you?

A. This was to the Davis Metal Products Company and the—well, it is not a loss, it is what the profit would have been.

Q. What is the difference between the price you paid for it and the price you had resold it?

A. Three hundred fifteen dollars fifty cents.

Q. That is Louisville.

MR. READ: Your Honor, I hesitate to make an objection, I know this is a complicated sort of mat-

ter. I just wonder, he is testifying to any damages here before there has been any showing as to the fact that there should be any damages. That is as to documents as to the sale of any claims made on them.

THE COURT: That is a matter that very well would have been brought up on pre-trial, the right of the defendant on cross bill to recover for resale. I don't know whether that was covered by pre-trial or not. Can counsel advise me as to that?

MR. READ: As to whether they can make a claim on that?

THE COURT: Yes.

MR. READ: I believe under the decisions, even where persons could not originally bring an action in the court they may set them up as a matter of set-off on the counter-claim. That wasn't the point I was making here about this. We don't have any—we are getting testimony here as to damages that is as to what certain property could be resold for before we have any evidence as to just what the transactions were, what the documents were.

THE COURT: Well, it may have been out of order, I am going to leave it in with your right to move to exclude it.

MR. ROBERTS: Of course we are putting that in, if the Court please, as evidence of market value. We are not depending on the profits at all, but we say what he resold it for is evidence of the market value at the time.

THE COURT: All right, sir.

MR. ROBERTS: And that was it.

THE COURT: I assume that you will prove what would have been the market value then, in some other way. I don't think just the mere fact that you had a contract to sell them necessarily establishes market.

MR. ROBERTS: I don't think it necessarily does. I was going to ask Mr. Robbins if that was the market price for that material as of that date.

THE COURT: All right.

MR. ROBERTS: And I guess I had better ask him right now while it is on my mind.

Q. Mr. Robbins, the prices shown on those schedules, the sales prices of those materials on those two schedules identified as Defendants Exhibits 1 and 2, do those constitute the market price on that material as of the time that it was sold?

A. Yes. We have purchase orders to corroborate these prices, and we have also additional sales orders of similar types of material, and it was soon after this the prices increased immensely, I think a matter of two or three months that prices were much greater than those prices.

Q. But those do represent market price of that material as of the time that you agree to sell it to these people?

A. Well, by market price, there was no standard price, that was a matter of the value of supply and demand, and the prices we were able to get on this particular

metal, so therefore that should substantiate the market price this particular material.

Q. In your opinion was that the market price as of that time?

A. Yes, sir, it was.

THE COURT: What you want to establish was the market price as of the time when the Government should have delivered it under the Government's contract, that would be what would govern.

A. These were the prices, we had a ten day period, let's see, it was February 22nd, the time I, that document he just showed me that they called and gave me a list of this metal. I think it was the 22nd or the 23rd, and we had from that time until the time that they phoned and said it was cancelled, was almost twenty days in which we had advertised and sold it at these prices. So that was the current market price on this particular material at that particular time.

Q. Well, at the time the Government cancelled the delivery?

A. That is correct.

Q. Is that true on the Detroit delivery also?

A. That is correct, yes.

BY THE COURT:

Q. I believe you said the date the Government cancelled was March 15th, '46?

A. It was a couple of days before then, because I re-

member, my wife had a baby on the 15th, and I know it was--

Q. All right, that is all right.

A. It was a couple of days before that.

BY MR. ROBERTS:

Q. I'll hand you one of the documents attached to these interrogatories to refresh your memory, Mr. Robbins, and ask you if you filed, had a claim against the Atlanta office of War Assets, and ask you to explain, as I understand it, you purchased what, from—one kind of material from them and they delivered another kind?

A. Yes, sir. This material was purchased, let me make sure I have got the right one now—yes—this material was purchased and delivered to the E. G. Sheet Metal Company here in Atlanta. They were using it for forming and it had to be a soft alloy which was called S. O. designating alloy which was soft enough for forms. The sales documents designated the material as being S. O. and it was delivered to this customer, the boxes also were marked S. O., but upon opening the boxes they found it was S. T.

Q. Could they use the S. T.?

A. No, they couldn't.

Q. What happened to the material?

A. Well, as I recall, we called here, being that it was purchased out of Atlanta agency and they sent, I think they sent an inspector or two by there, but it seems that they could never, they would not accept the return of it.

Q. Did you have to pay any expense in connection with it?

A. Well, we had, we reimbursed our customer for their handling costs and the crating and re-crating, and we resold the metal, I think it was to LeTourneau up in Toccoa at a loss.

Q. How much was your loss on that transaction?

A. I don't recall.

THE COURT: Gentlemen, while he is looking up that information--

THE CLERK: Defendant's Exhibit 5, being marked for identification, being several letters to Associated Aluminum and Metals Company.

Q. What was the amount of expense that you went to in connection with that material, Mr. Robbins?

A. The loss was three hundred forty four dollars, twelve cents, which War Assets refused to pay the claim on.

Q. I'll hand you Defendant's Exhibit Number 5 to refresh your memory, and ask you if you purchased some materials from the St. Louis office of War Assets which they failed to deliver?

A. Yes.

Q. What did you pay for that material, Mr. Robbins?

A. We paid, we agreed to pay--

Q. Agreed to pay, I mean.

A. For $232.95. We sold it to the Prudential Insurance Company of Newark, New Jersey for $430.73.

Q. In your opinion was that a fair market value for that property at the time you bought it?

A. Yes, it was, yes.

Q. Now, did you have any other transactions in the St. Louis Office?

A. Well, this was a Kansas City, Missouri office, I mean, as I recall it, the Regional Office was in St. Louis, and we were dealing with Kansas City, Missouri. We had a purchase of material that we agreed to purchase for $298.40, and they agreed to sell it, we resold this to Alloy Fabricators in Detroit, Michigan, for $456.32. The profit would have been $157.86.

Q. Was that sales price in your opinion a fair market value for that material at the time you bought it?

A. Yes, sir.

Q. Did you buy some more from that office?

A. Yes, we got some material that amounted to two thousand ninety three dollars, that was ten thousand pounds, at almost twenty one cents a pound, and we sold it at thirty cents a pound, which would have been three thousand dollars.

Q. Was that in your opinion a fair market value for it at the time that you bought it?

A. Yes, it was.

Q. And how much was the difference between what

you agreed to pay for it, and the market value at that time?

A. The profit would have been nine hundred seven dollars.

Q. Did you have another transaction with that office?

A. Yes, we bought some materials that amounted to five hundred fourteen dollars, twenty five cents, and sold it to this same Alloy Fabricators in Detroit for seven hundred eighty six dollars, twenty four cents. The profit would have been two hundred seventy one dollars, ninety-nine cents.

Q. What—was that in your opinion a fair market value as of the time you purchased it?

A. Yes, it was.

Q. Now, Mr. Robbins, did the Government ever give you any reason for refusing to deliver this?

A. I beg pardon?

Q. What was the reason given you by the Government for refusal to deliver these materials to you, or did they give you any reason?

A. Well, there were probably many reasons, because we were dealing with individuals in different branches of the different offices, basically, they didn't go to any great extent to give reasons.

Q. Was it or not just an arbitrary refusal to deliver, insofar as you were concerned?

A. Well, as far as I knew, it was.

BY THE COURT:

Q. Let me ask the witness, did they ever give you any reason on any delivery?

A. Yes, Your Honor they did.

Q. What was it?

A. I recall a transaction which I was just refreshing the transaction there, through the files, where we made this purchase that was mentioned by Mr. Roberts first from the Los Angeles agency, that, if you recall that was closed and it was sold to us in February, I think February 22nd or 23rd, of '46, and there was a ten day waiting period which was customary after which time they made the various sales, and I, this, when I had this call in March, the reason was, as I recall, that after the sale was made to us, there was another company in California that got a like amount, some poundage that was similar to ours, that I think was, well, the reason was given that there were complaints from local people after the sale had been consummated that it should go to them rather than to a firm in Georgia.

Q. Who gave you that statement?

A. Mr. Olsen, who, from whose office our representative, Mr. Johnson telephoned me informing me of the cancellation.

Q. All right.

A. Now, usually they had various reasons. I recall some reasons would be that they had material listed that they were unable to locate, and couldn't deliver. Occasionally there would be, there have been times when

they made an error and sold the same material twice and it was just a matter of give and take a little bit. If they would explain it, and if we had not sold it, and if our customers, if we could locate it elsewhere, we would go ahead and relinquish it.

BY MR. ROBERTS:

Q. Mr. Robbins, just to be sure we have got it clear, now these market values you testified to, were they the market values of this material at the time the Government refused to deliver it to you?

A. Well, they were the market values at the time that we offered it and resold it. Now, if you will look over some of our sales documents, you will notice that we were selling both the Fabricators and to other dealers, smaller dealers, that would buy small lots for resale to their customers who were fabricators, so the fact that we were able to advertise and sell this material at those prices, I think would indicate that that, that they were fair market value prices.

MR. ROBERTS: He is with you, Mr. Read.

CROSS EXAMINATION

BY MR. READ:

Q. Now, Mr. Robbins,—

Will you identify this, please sir?

THE CLERK: U. S. Exhibit number 7, being War Assets Sales conditions, dated March 25, 1946.

(U. S. Exhibit No. 7 marked for identification.)

Q. Now, Mr. Robbins, you mentioned a lot of purchases you made from the Government. Now when did you consider that you had actually made a purchase in any of these transactions with the War Assets Administration?

A. Well, some time in the spring or up until the spring of '46, when I, as I recall, well, we were first dealing, in '45, we were dealing with the Treasury Department and R.F.C. and it was at that time, it was more negotiations, you would go in and they would have material to sell, they had no particular waiting period, as I recall, of any set amount of days, and it was more negotiations, and I think that's when it was transferred to the Reconstruction Finance Corporation, the latter part of '45. It was handled more or less informally like that up until the time, and somewhat after, as I recall, of R.F.C. I mean the War Assets Corporation was changed to the War Assets Administration.

Q. Well, I think you are getting off the track. You said you purchased, now, I want to know just what time in these transactions that you consider that you made a purchase and that the Government had actually made a sale to you, of certain property?

A. Well, the way it was handled, that they had a closing date and they would notify those people that they had decided to sell it to, that it had been sold to them, and that was the time everybody assumed that it had been sold, because it was delivered.

THE COURT: Gentlemen, don't the documents answer that question?

MR. READ: I don't think we have any documents on these.

THE COURT: Let me ask—

BY THE COURT:

Q. Was that an oral sale of the Government, or was it in writing?

MR. READ: That's what I am trying to get at.

A. What they had, they had this list here, they published a list, and we would come in and they would designate, they would take one of these lists and they would consider a master sheet, and they would mark off the companies they had sold it to on this list, it was handled very informally up until the spring of '46.

Q. Well, now, did they give you any writing, showing that you had bought certain things?

A. What they would do, they would say, now, these lots are yours, for example Company A had certain lots, Company B had been awarded certain lots. Then we would begin advertising that material for sale.

Q. Wait now, before you go into advertising, you walked in and wanted to buy certain things, the Government had a certain list, and when, and you would agree with them at a certain price, and a certain amount, is that correct?

A. They had an established price.

Q. A certain price, and you told them you wanted a certain amount.

A. That's right.

Q. Was any writing done by you or the Government at that time?

A. Not at that time, because they had to go, that is the time they would begin this paper work on making up the sales documents.

Q. But did you get any writing from them at a later time?

A. At a later time, we had a line of credit with them, and they would process it wherever the agency may have been, the credit was processed through the Atlanta office, and it took quite a long time.

Q. Did they send you a paper confirming the sale?

A. Yes, later, much later.

Q. Was the paper here in court?

A. No, we never got it, because it was cancelled before I got the paper work.

Q. You never got any paper from the Government confirming the sale?

A. No.

Q. And you are just relying on the oral statement between you and the Government as to the sale?

A. That's right.

Q. None of these you are suing for, do you have any invoice or any written confirmation from the Government at all?

A. I don't recall all of those. This was the major transaction. I don't recall—

MR. ROBERTS: If the Court please, as I understand what it was, they would have this agreement based on these catalogs, then when the Government delivered the material, they would issue what they called a sales document which went along with the material.

THE COURT: When they delivered it?

MR. ROBERTS: Yes, sir.

THE COURT: But the question is, they said they didn't deliver it?

MR. ROBERTS: That's right, prior to that they were oral contracts. We have sales documents on some of these materials that were delivered, but the material that wasn't delivered, we don't have any sales documents on it.

THE COURT: I suppose you have already put in evidence all the papers where you do have any confirmation.

MR. ROBERTS: Yes, they are all in in the interrogatories.

MR. READ: Your Honor, when we got to that business of interrogatories being introduced in evidence while ago, we sort of were dealing with two or three things at once, and I don't mean to agree that all of those documents in those interrogatories would be admissible in evidence and I don't know whether they have been admitted yet.

THE COURT: They have not been tendered yet, as far as I know.

MR. ROBERTS: Yes, I tendered them then and you admitted them while ago. Of course that is subject to objection.

THE COURT: All right.

MR. READ: Now, then they are not in evidence?

THE COURT: Now that indicates they are in evidence. He said he tendered them, and I admitted them. I don't know, the record will show.

MR. ROBERTS: It doesn't matter, if he has objections to it, I am perfectly willing for Your Honor to rule on it.

MR. READ: Well, it seems to me like, I may or may not want to object to the specific documents there, but I think that as each, if we go about it on the basis of one by one, we will have an explanation of it rather than just having a whole batch of the documents.

THE COURT: Yes, the documents attached in the interrogatories have been admitted, if at any time later you want to move to rule any of it out, you could. Here is what I am trying to avoid. you asked the witness on the stand when certain things were done. He I assume does not know all those dates in his own mind, and they will show for themselves, so I think you ought to confine his testimony to oral transactions which are not shown by those documents. Do you see what I mean? You will clutter up the record and cause confusion otherwise, and if it takes a little recess to do that, let's do that and let's both sides check over the documents, dates

and sales and find out whether there are some not represented by invoices, then you can testify about those oral transactions. Do you follow me?

MR. READ: Yes, Your Honor, I agree.

THE COURT: Let me ask is counsel ready in this Morriset case?

MR. TYSINGER: Yes, sir.

THE COURT: All right, I am going to recess this trial, the one on trial here until 1:30 and I am going to get counsel to go through their documents introduced, and so forth, and then if you want to ask this witness about any oral transactions, you can do so, but let's don't have the confusion of asking a man about things which are shown by documents unless he has the document there. All right. I'll ask you gentlemen—we will excuse this case until 1:30, and take this other case up at this time.

(Whereupon the parties were excused.)

AFTER RECESS (1:30 P. M.)

MR. ROBERTS: If the Court please, I am going to use Mr. Throckmorton, he is a long ways from home, and I would like to use him at this time.

THE COURT: All right, you may proceed, gentlemen.

MR. A. A. THROCKMORTON: Having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROBERTS:

Q. What are your initials, please?

A. A. A. Throckmorton.

Q. In March, 1946, where were you employed?

A. I was employed by the United States Government in Washington.

Q. In what capacity, sir?

A. I was chief of the Non-Ferrous Metals Branch of the War Assets, I am not sure whether it was Administration or Corporation at that time.

Q. In your capacity as chief of the Non-Ferrous Metals Branch of the War Assets, Mr. Throckmorton, did you have occasion to know about a sale of material, I hand you defendant's Exhibit Number 4, which is a catalog, did you have occasion to know about the sale of the materials described in that catalog?

MR. READ: Your Honor, I want to object to that on the ground that whether or not that was a sale it seems to me would be a conclusion. He can state the facts of what took place.

THE COURT: That's all right, gentlemen, I'll try—

MR. ROBERTS: I wasn't talking about the sales to Mr. Robbins, I was talking about generally whether he knew about the sale of that property.

A. I was familiar with this offer.

Q. Did it come to your attention that a large amount of that property had been disposed of to some one?

A. Yes, sir.

Q. How did that come to your attention, Mr. Throckmorton?

A. Why, we had a number of complaints from the various buyers in the Los Angeles Region that this property had been sold, and—in either one or two lots, to one or two individuals, I'm not quite clear whether there was only one involved at the time, or two.

Q. Those complaints were what, that these people out there wanted to buy them, the smaller dealers?

A. That s right, some of the dealers in the Los Angeles area felt they had not had an opportunity to bid on this material and as a result of this complaint, we requested the Los Angeles office to cancel the sale.

Q. Did you talk to the Los Angeles office about this material?

A. Yes, I did.

Q. Do you remember who you talked to there?

A. Well, I believe I talked to several people in the Los Angeles office. I think Olsen was one of them, who was in charge of the metals section of the Los Angeles Disposal Office.

Q. What did he tell you in regard to whether it had been sold or not, any of the material?

A. Well, he reported to me that the material had all been sold by the San Diego Branch of the Los Angeles office, and—

Q. Did he tell you to whom it had been sold?

A. Well, I wasn't particularly interested at that point.

I don't recall whether he mentioned to me to whom it had been sold or not. The point was it had been sold in one or two large lots by San Diego which was contrary to instructions that were outstanding at that time.

Q. And you instructed them to do what, Mr. Throckmorton?

A. I instructed them to cancel and re-offer to the other dealers in the normal manner. By that I mean that either allocate the material, if there were a number of buyers for the various items, or sell it by the lot instead of one large quantity.

Q. And was that done?

A. Yes, sir, it was.

MR ROBERTS: He is with you.

CROSS EXAMINATION

BY MR. READ:

Q. Mr. Throckmorton, will you explain just what was the procedure that the War Assets Administration or corporation had in actually making sales of surplus property?

A. If you are talking about the operating procedure, I'm sorry to say I don't work in a regional office, and I was not familiar with it, but I assume that the method of sale didn't differ from ordinary methods of procedure.

Q. Do you know what any of the regulations provided at that time as to the sale of surplus property?

A. Beg pardon?

Q. Do you know what any of the regulations or in-

structions at that time were of the War Assets Administration as to the sale of such property?

A. Well, the Washington office laid down a policy at that time for methods of offering. I did not get into the operating details as far as the issuance of forms, or the actual sale of the material, direct sales of the material.

Q. Now, you stated that this property was sold. Now what do you know about whether it was actually sold or not?

A. Well, that, what was reported by the Los Angeles office, that the material had been sold, and they apparently so notified the other buyers for the material that the property had been already disposed of, and wasn't available.

BY THE COURT:

Q. Did you take that to mean it had been sold before the offer came in by these defendants here to buy it?

A. No, sir, it was sold to them, but—

Q. I see, but cancelled out under the new instructions?

A. That's right.

THE COURT: All right.

BY MR. READ:

Q. Are you familiar with the various documents and papers that were the actual sales documents?

A. No, sir.

Q That the War Assets used?

A. I was not.

Q. Will you look here at Government Exhibit number 2, the part there that says, "Conditions of sale" and state whether or not you are familiar with that?

A. Well, I am familiar with it in a general way inasmuch as I have read it before, but I am not familiar with it as far as actual knowledge of the fine print.

Q. Do you know whether or not those conditions of sale governing all transactions involving the sale of surplus property?

A. Well, as I recall the conditions of sale were changed repeatedly under the tenure of the War Assets Administration and War Assets Administration, so that is a rather difficult question for me to answer. You see, the War Assets Administration had different sets of rules than the War Assets Corporation did, and prior to that, the R.F.D. was distributing surplus property and they operated under a different set-up, different set of circumstances, so that as far as the actual rules at any given time, I can't answer that from memory.

Q. Do you know whether or not any R. F. C. or War Assets Administration or War Assets Corporation personally ever had the authority to enter into the oral binding sales of government property?

A. The bulk of the property was, the majority of surplus was sold on oral commitments which was confirmed at a later date. As far as authority to sell, each Regional Office had discretion up to a certain amount, several hundreds, or thousands of dollars, to sell.

Q. Was that to sell on oral agreement, that's what I am getting at mainly. Just what, if any, was their au-

thority to sell on an oral agreement, that is, to enter into a binding sales agreement that would have been binding on the Government?

A. Well, I don't feel I am qualified to answer that question, because I really couldn't tell you.

Q. Well, you don't actually know whether this property was sold or not then, do you?

A. I merely know what was reported to me by the Los Angeles office.

Q. You stated that the sale of property in the amounts that these properties, whatever it was, was sold, as you say, was contrary to instructions at that time?

A. That is—

Q. Will you state just what the instructions were, were they oral instructions, or written instructions, or what?

A. My recollection is that the California, the Los Angeles office requested permission to offer this material to users in San Diego for a preliminary period, claiming that they had complaints on offerings in the past, that local dealers in the area where the materials were located did not have an opportunity to bid on the property. We gave the Los Angeles office permission to have it offered by San Diego to San Diego users for a preliminary period at which time it was to revert back to the Los Angeles office for sale to all buyers.

Q. Now would you say then that if anybody had entered into any kind of oral negotiations for the sale of all that property that they would have been without authority to do so, being contrary to instructions at that time?

A. Well, if I were buying or selling merchandise I would certainly want a written commitment, but I know in normal business procedure we buy and sell constantly, almost hundreds of thousands of dollars worth of material based on oral commitment, confirmed later by a written confirmation. It is not unreasonable to act on a verbal commitment. In fact, I have done so in the securities business as well as in the aluminum business for a good many years.

Q. When any oral negotiations have been entered into, were there usually other documents, for instance, was there any written offer or bid that was made on any particular lot of property?

A. Yes, I believe that the bids had to be written.

Q. Then they had to be accepted in writing by the War Assets Administration or Corporation, didn't they?

A. I, without any question.

Q. Would you say then that there had actually been any contract at all until, let's see those, unless one of these sales documents had been, plaintiff's exhibit number 6, sales document there, would you say whether or not any contract had been entered into, any binding contract, until that sales document there accepted it?

A. Yes, I would in some, because this appears to be an invoice. Normally there is an order, acknowledgment that goes out.

THE COURT: What is that exhibit number?

Q. Number 6.

THE COURT: Plaintiff's 6?

MR. READ: Yes, sir.

BY THE COURT:

Q. Let me see if I understand your answer. Do you say that you would not consider that there would be any binding sale until—did you say until the invoice was issued or until an acceptance of the bid?

A. Acceptance of the bid.

Q. Acceptance of the bid. I see.

BY MR. READ:

Q. All right, sir, now, Plaintiff's exhibit number 5, would you look at those "Conditions of Sale" there. Now, if I may read it, it says, "Entire agreement between the parties with respect to the sale of the property specified and the buyers invoice to be comprised of the material stated therein," in these conditions of sales, and then it goes on further, I believe that would probably go a little further to corroborate your statement that actually no contract had been entered into until that sales document had been issued, is that correct?

A. If you will point out the section you refer to, it might save a lot of time.

Q. I was reading right at the beginning, the first sentence there, the "Conditions of Sale."

A. Well, I still am not clear as to what section you refer to.

Q. That is, the entire agreement between the parties with respect to the sale of the property specified in the buyers invoice will be comprised of the material stated therein, in these conditions of sale.

A. Uh, huh. What—

Q. Well, would that then go further to corroborate your statement you made a minute ago that actually no contract would have been entered into until the, this sales document had been issued, is that correct?

A. Well, I am not a lawyer, I am afraid I can't answer that.

Q. Do you know anything at all about the procedures under these sales, the issuance of these sales documents, any claims that were made for adjustments of—

A. Yes, I do know. I am familiar with that.

Q. Are you familiar with the requirement that appears to be in all of these conditions of sale, to the effect that any claim must be made within fifteen days, and that the decision of the Administrator on that shall be final?

A. Well, I don't know. I am familiar with a number of claims and adjustments, whether they were made within fifteen days or not, I can't tell you, but in many cases it took several years to reflect settlement.

BY THE COURT:

Q. May I ask you if this testimony refers to just one of these counts, or—

MR. ROBERTS: Yes, sir, just the San Francisco count.

THE COURT: Just the San Francisco Count?

A. San Diego.

THE COURT: Which you say is part of the Los Angeles office?

MR. ROBERTS: Count 12, is the only count this testimony refers to.

THE COURT: Count 12?

MR. ROBERTS: I mean paragraph 12 in our counter-claim.

THE COURT: Paragraph 12. All right.

BY MR. READ:

Q. Mr. Throckmorton, do you know whether any written bids and sales documents were made or issued on this particular property at San Diego in 19—

A. I'm sorry, I don't recall whether there was an acknowledgment, written acknowledgment made of it or not. All I know is when we cancel the sale, we had—

Q. You say cancel the sale, you don't know that there was any sale made, do you?

A. We were informed by Los Angeles they had sold the material. We reviewed the facts and instructed them to cancel the sale. Now, as to whether an acknowledgment had gone out, or not, the Los Angeles office considered a sale had been made. I am sure at the time that I, that they must have notified me whether they had sent out a written acknowledgment or not, but I don't recall whether they notified me or not, but I recall very well the protest that we received on the cancellation, both from the San Diego office, from the Atlanta office, and from Mr. Robbins.

Q. Now, I am not quite sure whether I understood whether you answered my question while ago, as to whether or not if there had been any sales entered into out there, that they would have been without authority.

A. Well, the San Diego office was supposed to return the offering list to Los Angeles for disposition of the material not taken by local San Diego users, but that was not done.

Q. Well, now, if various lots of this property had been ordered, and sales documents issued on them, would you say that there had been an actual contract entered into before those documents were issued?

A. I'm sorry, I don't understand your question.

Q. Suppose out of this some five hundred thousand pounds of metal out there, that later, some time during the month of March or April, there had actually been an order for a bid filed, and then a sales document had been issued. Would you say that there had been actually a contract of sale entered into before that time of that particular lot of property because of this—

A. Because of this present sale, the one we have under discussion?

Q. Well, I'm talking about, if lots of that big batch of five hundred thousand had been made available at particular times and specific orders or bids made by Mr. Robbins, and then sales documents were issued in acceptance of those bids or orders, would you consider that there had been any valid or binding contract entered into with regard to that property until that time?

A. I think I understand your question now. Your

point is, would we have cancelled the sale if the sales document had been issued?

Q. Well, now, I don't want to argue with you on the stand, you keep saying about a sale was made. Now, I don't see that we have any evidence here of actually a sale being made. Now, you say that you don't know of your own knowledge that any actual sales had been made of, sale, or sales, of any of that property out there.

THE COURT: Aren't you really asking him a question of law there, Mr. Read, as to what a sale is? Isn't that a question of law from the facts?

MR. READ: Well, to a certain extent it is, yes, sir. He has been testifying that a sale was made here several times. I was just trying to get—

THE COURT: Let me ask if the parties contend this is a Georgia contract?

MR. READ: No, sir. I believe under the law it is governed specifically by the federal law. I have a citation—

THE COURT: Well, the federal law controls as far as it covers, but when you talk about a contractural matter between the federal government and an individual which takes place in a particular state, I don't know whether the Act defines such fundamental things as what is a sale, and I don't know whether the Georgia Statute of Frauds played any part in the case. Do you think it does?

MR. READ: No, sir, I don't believe the Statute of Frauds of Georgia or California either one enter

into the matter at all, Your Honor. I have a case on that very point.

THE COURT: Are you trying to get down to this: If this is an oral agreement between them not reduced to writing and the goods not delivered, no invoice, no confirmation, whether that is or is not a sale?

MR. READ: Yes, sir.

THE COURT: All right, I still think that is a question of law.

MR. READ: I have a case directly on the point, U. S. against Jones, 176 Federal Second, 278.

MR. ROBERTS: I might say for the benefit of the court and Mr. Read, it is our contention the contract was actually in writing.

THE COURT: You contend it was in writing?

MR. ROBERTS: Yes, we contend we made a written offer which was accepted in writing, yes.

THE COURT: I think it is all right to ask this witness here how it was done, what was the practice, but to ask him what is a sale, I think that is a legal question.

MR. READ: Well, he testified—

THE COURT: He can state what he considered a sale.

MR. READ: He testified he didn't know anything about the sale anyway, Your Honor, so I don't think

that is particularly a point here, I don't believe I have anything further to ask him.

MR. ROBERTS: If the Court please, I would like to excuse Mr. Throckmorton, if there is no objection by the Government.

MR. READ: No objection.

THE COURT: All right, you are excused.

(Whereupon the witness was excused from the stand.)

THE COURT: All right, do you have any other out of town witnesses?

MR. ROBERTS: Yes, Mr. Dechman.

His will be short, will be very brief too.

MR. READ: Your Honor, I want to move at this time to exclude the testimony of Mr. Throckmorton. I don't believe he has testified to anything that has any bearing on the case. There has been no showing of a contract, any binding, legal obligation, and he stated he didn't know of any sale. I don't think there has been anything he testified to.

MR. ROBERTS: He certainly showed a government agent in Los Angeles told him there had been a sale, I think it is certainly very pertinent.

MR. READ: You can't prove by that, the fact he had a conversation.

MR. ROBERTS: It is just corroborative.

THE COURT: He said he learned that, about this sale, that he learned about complaints from dealers

in Los Angeles, that he instructed that these sales be cancelled, and that it be offered out there. Now, of course that probably has some bearing, but it is going to depend on all the other factors and circumstances as to what bearing it had. For instance, if at the time he ordered this sale to be cancelled, it was already a binding contract between the Government and these defendants, then it couldn't be cancelled. Do you see what I mean? Because rights would have already been vested. I believe I'll leave his testimony in there for the time being, before I make my findings of fact, I will give both sides an opportunity to be heard as to that before I rule out any testimony, as to whether you object to it or not.

MR. READ: All right, Your Honor.

MR. T. A. DECHMAN: Having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROBERTS:

Q. Your name is T. A. Dechman?

A. Yes, sir.

Q. Mr. Dechman, in March, February and March, 1946, where were you employed?

A. I was employed in Atlanta.

Q. By whom?

A. By the United States Government.

Q. What agency?

A. War Assets, either Administration or Corporation.

Q. What was your position at that time?

A. I was in charge of the general overall sales of the organization under the direction of the Regional Director. I think I had a title of Deputy Regional Director.

Q. Did Mr. Robbins come to see you at that time, about that time, about disposal in Los Angeles—

A. Yes, he did.

Q. And did you talk to a Mr. A. A. Throckmorton about that?

A. Yes, I did.

Q. And did Mr. Throckmorton, what did Mr. Throckmorton tell you about what happened?

A. Mr. Robbins, as I recall it, reported to me that he had purchased a large quantity of non-ferrous metal outside of Atlanta, and the sale of that property to Mr. Robbins had been cancelled upon instructions from Mr. Throckmorton. He asked me to call Mr. Throckmorton and report to him that, in his vernacular, he was going to sue the Government.

Q. What did you do after that?

A. I reported the fact to Mr. Throckmorton of this conversation.

Q. Did Mr. Throckmorton tell you why he cancelled the sale?

A. He told me that he had cancelled the sale because of the fact that the property had to be re-offered.

Q. Now, Mr. Dechman, you were familiar with the method of disposing of your surplus property by War Assets?

A. Well, I was about as familiar as anybody could be. It changed considerably constantly, and you had to keep

abreast of that by the various regulations that were issued.

Q. The terms and conditions of the sales changed constantly, did they not, particularly in the first few years?

A. The method of sales, how sales were handled, the various advertisements, forms, documents, the methods of individual negotiations changed considerably and they changed within types of property. For example, the consumer goods type property were sold in a different manner than were metals, or real estate, or other property.

Q. Isn't it true, Mr. Dechman, that the forms were constantly being changed?

A. In the early beginning of War Assets, I mean of the surplus property disposal, we had a hodge-podge of various forms, each particular agency adopted its own form as best suited its purposes to try to carry out the purposes of the acts. They finally in an effort to get these documents on a uniform basis held meetings in Detroit and Washington between the Regional Offices, and we tried to unify the whole system in that manner.

MR. READ: Your Honor, I hate to keep objecting, but seems to me like that unless Mr. Dechman is going to testify to something in particular, that has relation to these things, these particular transactions, that we have got in this case here, that all this is irrelevant, and has very little bearing.

THE COURT: I'll leave it in, I don't see how it could have any effect, because it is not a question

of whether you used different forms. It is a question of what was done in this case.

MR. READ: Yes, sir.

THE COURT: It isn't a question of form number so and so, whether it is written with pencil or pen, I'll leave it in, I don't know that it has any bearing.

MR. ROBERTS: I was introducing it, if Your Honor please, because he asked about these terms and conditions on the back of those documents, and I expect to show this form was not even in use at the time of this California sale.

THE COURT: I think I know how these new agencies during the emergency, how they operated, changed forms, finally had to stabilize it more or less, but that is all right, we will let it in.

Q. Mr. Dechman, were any sales, oral sales ever made by War Assets?

A. In certain types of goods, or property, oral sales were made, and confirmed by documents at a later date.

Q. When was this so-called—I hand you Plaintiff's Exhibit number 6, which is denominated a sales document, can you tell me when that was made up and issued in relation to a sale?

A. This was the last, probably the last document prepared in connection with the sale, it was a part of a set of forms, which also was called a delivery order.

Q. And isn't it true that those forms were made up usually when the property was delivered and was ready for delivery at least?

A. That's right.

CROSS EXAMINATION

BY MR. READ:

Q. Was there ever any time under the War Assets Corporation or War Assets Administration when it was handled by R.F.C. that there was not some kind of sales documents that were used when this personal property was transferred, Mr. Dechman?

A. Well, I can speak only for the Atlanta Regional office. I don't recall of any time that the final completion of a sale was handled without a sales document of some kind or other.

Q. All right, sir, then the final completion of the sales, is, or was, when the sales document was issued in acceptance of the offer or bid, is that correct?

A. Either a sales document or a letter of confirmation. I have in mind the sale of a very, very large amount of steel in Tampa, that was handled under the old R.F.C. We handled that on a verbal commitment basis, and it was definitely committed, and it was later withdrawn because the time elements were not complied with as to the payment of the monies.

Q. Then from what you say there actually would be no contract of sale of the property until either that sales document was issued, or some other kind of writing confirming the sale, is that correct?

A. Yes, sir, that's right.

Q. Then actually anything oral before that sales document was issued would just be negotiations leading up to that sale which would actually, contract of sale, which would be when the sales document was issued?

A. I think so.

Q. Do you actually know, of your own knowledge, about any transaction out in San Diego regarding any aluminum?

A. No, I do not.

Q. Now you said that, while ago, that if there were some oral sales made, that they were made and confirmed by documents later. Now, would your answer still hold there, that the oral part of it was just negotiations and actually there would be no contract of sale until the sales document or some confirmatory letter was issued?

A. That is a rather difficult question to answer, because—

Q. I think you answered in one way while ago.

A. Because we had so many different kinds of property to sell. I recall exactly how we sold some jeeps over in the Cracker Stadium one time. We had a bid, and the Veterans came in and bought five or six hundred jeeps at one time. They were awarded these jeeps verbally on the high bid in a public hearing, and they came across the street and got their sales documents and paid the money for it. Now at what time that became a sale is a question for you to determine. It would seem to me that it was a sale when it was knocked down to the man and not when the document was given to him. Do I make my point clear?

THE COURT: There is quite a big difference in sales and auctions, ordinary sales.

MR. READ: Yes, sir.

THE COURT: I still think you are trying to get him to answer a legal question here.

MR. READ: Well, I guess to a certain extent that is so, Your Honor.

THE COURT: You see, if he said it was customary to do it orally, and they have a, afterward have a delivery, or make the invoice, then that makes it without a question an oral agreement. Reduced to writing it is no longer an oral agreement, so it doesn't prove anything.

MR. READ: All right, sir. Well, I won't keep you much longer—

Q. You are familiar with the working of the War Assets Corporation and the War Assets Administration?

A. Pretty thoroughly.

Q. During '46 and '47?

A. Yes, sir.

Q. During that period. Now, would you state whether or not, if some office of the War Assets Administration actually entered into a sale of property when they had instructions not to do so, would you say that they had done that without authority? That may be close to a question of law again.

A. I don't exactly understand.

Q. If you here in Atlanta, had been instructed not to sell certain property that you had, and then you had gone ahead and sold it any way, would you say you had sold that without authority?

A. Well, if I had done that, I would say I had sold it without authority.

THE COURT: Mr. Read, you understand this

witness, are you talking about any particular sale, or just sales in general? What sale—

MR. READ: Well, I'm just getting him more or less to answer a hypothetical question based on the testimony while ago that there had been instructions at the San Diego office not to sell.

THE COURT: If I am not in error, the only thing this witness testified to on direct was about this Los Angeles matter, where he had a talk with Mr. Robbins and Mr. Throckmorton.

MR. READ: Yes, he did. Then he went on to say something about oral sales, that some were made and confirmed by documents later.

THE COURT: Now, Mr. Roberts stated he expects to show a written sale on that Los Angeles matter. If so, all this talk about oral sales is more or less academic. I don't know whether you have put it in evidence yet or not, have you?

MR. ROBERTS: I have not, no, sir. But—

THE COURT: I see.

MR. READ: Well, I think that is about all I have of this witness then, Your Honor.

THE COURT: All right.

MR. ROBERTS: Come down, Mr. Dechman. I would like to excuse Mr. Dechman, if it is agreeable?

MR. READ: I don't believe there is any objection. (Whereupon the witness was excused from the stand.)

MR. ROBERTS: I believe I had given up Mr.

Robbins for cross examination. I am going to want to ask him some more questions myself, if you had rather I would go ahead.

THE COURT: If you have any more direct, you had better finish with him.

MR. READ: Yes, sir, I had just started. I don't think we had got anywhere on cross examination.

THE CLERK: Exhibit number 6, copy of letter, Johnson Trade Developing Company inc. dated February 19, 1956.

(Deft. Ex. #6 marked for identification.)

THE CLERK: Defendant's Exhibit 7, copy of letter of War Assets Administration, dated March 29, 1946.

(Deft. Ex. #7 marked for identification.)

THE CLERK: Defendant's Exhibit Number 8, War Assets Administration, Los Angeles office, dated April 1st, 1946.

(Deft. Ex. #8 marked for identification.)

A. Yes. We did receive one.

DIRECT EXAMINATION (Continued)

BY MR. ROBERTS:

Q. Mr. Robbins, I hand you Defendant's Exhibit Number 6, and ask you what that is. This is a copy.

A. This is a copy of a purchase order to the War Assets Administration made by the Johnson Trade Development Company, who were our agents in California.

Q. Made to whom?

A. To the War Assets Administration, Los Angeles.

Q. Was it made for you?

A. Made for us, yes.

Q. That the material that we have been talking about that you claim to have bought?

A. Well, if you will let me see that list, this doesn't show poundage or alloys. Yes, this is the same.

Q. I'll hand you defendant's exhibit number 8, which is a letter from War Assets accepting your, a bid on certain material. Now, I'll ask you if you received a letter like that one in regard to this material that you claim you have bought?

A. Yes. We did receive one.

Q. Have you been able to find it?

A. No, after we received the call that they had cancelled, we decided to turn it over to some attorneys in Los Angeles to see just what they could do, and we sent that to them, and we have never been able to locate it since then.

Q. But it was a letter just like the one there on those items?

A. Yes, sir, it was similar to this, this is a form acknowledgment of the acceptance of an order. Now, might I explain the difference between this and the invoice?

Q. Well, I mean, you did get a letter just like that, except it was on this—

A. Except it was for the poundage, and we are referring to the other first offering.

Q. I don't think we will go into the other right now.

THE CLERK: Exhibit Number 9, constituting nine sales agreements from the Reconstruction Finance Corporation.

(Deft. Ex. #9 marked for identification.)

THE CLERK: Defendant's Exhibit Number 10 represents four invoices including 1, 2, 3, 4, of one invoice.

(Deft. Ex. #10 marked for identification.)

Q. Mr. Robbins, I'll hand you defendant's exhibit number 9, and ask you if those are the sales documents on the property which you bought in Detroit and was not delivered to you. I'll ask you if those are the sales documents on the part of the Detroit orders, which were delivered to you, I mean.

A. I'm sorry, I didn't understand the question.

Q. Your counter-claim here for a certain amount of money for property which was not delivered to you by the Detroit office. Now, as I understand it, you ordered certain amount of material, which they didn't deliver all of it, I believe these documents, I'm asking if those aren't the doeuments on the material under those orders that was delivered?

A. That is correct, these were delivered.

Q. The part that wasn't delivered you never did get a sales document on?

A. No.

Q. But they were ordered on the same order that those documents were?

A. That's correct.

BY THE COURT:

Q. Did you get any type of writing whatsoever on those not delivered by the Detroit office?

A. No, sir. What happened, each office had a different procedure. There were some Government witnesses here, that—you will recall it much better than I, some gentlemen who were with War Assets, but it was customary at this time, now, this was back in the spring and before the spring of '46, where they would have offerings and would go sit down with the man who was making the sale, and if no one else wanted that material, if it were after the waiting period, they would mark it as being yours, and it was understood that it was yours. Now, Los Angeles had something that was a little bit different in that they gave a confirmation at a later date. Now, they are talking about sales documents, these gentlemen will explain the invoices could not have been made up until after the shipments were made because there were weights involved and they always varied.

BY MR. ROBERTS:

Q. I hand you Defendant's Exhibit Number 10, and ask you if that is the document on the Atlanta sale in which they shipped the wrong material to your customer, and you had there—crating charges.

A. You have another document, a copy of my complaint—claim-filed that I could check with these, that was to the E. G. Sheet Metal Company.

Q. Here is a letter from the claim, shows the number of the delivery order.

A. Yes, this is the material sold to E. G. Sheet Metal was part of this material.

MR. ROBERTS: I believe that is all from Mr. Robbins. I will introduce these documents. I will tender them now, if the Court please, Defendant's Exhibits number 6, 8, 9, and 10. Number 7 I am not going to introduce.

I'll tender this exhibit number 5 which was identified. It is a copy of the claim.

MR. READ: Your Honor, on Number 5, I doubt if that would be admissible. They are copies, no, it is purely a receiving document.

MR. ROBERTS: The claim is filed on these with General Services Administration.

MR. READ: Now, unless you are going to introduce the decisions on these claims—

MR. ROBERTS: They are already in, this right here, in the depositions, I mean in the answers to the interrogatories, these letters may be—let me check—

MR. READ: Your Honor, I would like to go back to what the objection I was making on this whole matter of this batch of photostats here. These interrogatories before lunch time, we have several different transactions involved here, and it seems to me like we are going to have to put them in separately and have some explanation of each one, if any of the stuff is going to be admissible, we can't just be going through a sheet of documents there,

picking out something that might be applicable to some other document.

THE COURT: It would be much more orderly if we take this thing if we could, by different transactions, keep them together.

MR. ROBERTS: The interrogatories keep them by paragraphs in the answer.

THE COURT: I believe I will suspend here and counsel may inspect those documents, if you wish, before in the morning. You can re-tender them tomorrow morning. Close the court until 9:30 in the morning.

(Whereupon Court adjourned at 4:30 P.M. until 9:30 A.M. Tuesday Morning, April 20, 1954.)

TUESDAY MORNING
April 20, 1954

(Court convened at 9:30 A.M. and the following proceedings were had.)

THE COURT: Proceed, gentlemen.

MR. READ: At this time, Your Honor, I want to move to strike the testimony of Mr. Robbins in its entirety on several grounds. One is that there has been vague and general reference on several occasions to transactions that, at Detroit, Louisville, Atlanta, as to the purchase and sale of various War Assets property. There has been—

THE COURT: I am going to reserve my ruling on that, Mr. Read, until I get all the evidence in, and all the authorities, then I will rule out all the evidence on motion that seems to be inadmissible or have no bearing. I believe that will expedite the case, rather than prolong it.

MR. READ: All right, sir.

THE COURT: Your cross examination will be considered subject to your objection.

MR. READ: All right, sir.

MR. ROBERT ROBBINS: Resumes the stand for further examination.

CROSS EXAMINATION

BY MR. READ:

Q. I believe you started off yesterday, Mr. Robbins, to testifying to about some five hundred thousand pounds

of aluminum that Mr. Johnson out in California had arranged for some time in the early part of 1946. Now, did you ever get delivery of any of that aluminum?

A. I don't—I don't recall under this offering, I know it was cancelled and that's what we have discussed, so for the intent of this particular case, I, we did not.

Q. Did you ever get any written acceptance of any written bid on that five hundred forty thousand, five hundred forty one thousand pounds of aluminum?

A. Yes, approximately, as I recall, and I have noticed other documents that the Los Angeles office—about, from four to seven days after the sale was made and agreed on, they would send out a form type of letter stating that you had been awarded, rather that the purchasers had been awarded certain amounts or lots of materials.

BY THE COURT:

Q. Did you get such a letter about this aluminum?

A. Yes, we did, and that was the, went in the file to these attorneys that we sent, we sent it to Los Angeles to see what they could do about it.

Q. Have you tried to get that letter from your counsel?

A. We have, Mr. Cohen has, and they said it was returned to us; and Mr. Cohen has not been able to find it in his file, and the attorney out there says he can't find anything in his file.

THE COURT: Now, gentlemen, it hasn't been objected to, the contents of that letter, but I think there would have to be a showing.

MR. READ: Yes, I want to move to strike that.

THE COURT: Before secondary evidence is introduced.

MR. READ: There has been a showing that written documents on any contract—

THE COURT: I am not going into all that. I am just saying he says a letter was written here, apparently sent to his attorney, and he has not been able to get it.

MR. READ: Yes, sir. Well, now—

BY MR. READ:

Q. Did you send any purchase orders to War Assets Administration on any particular portions of that offering out there of that aluminum, Mr. Robbins?

A. Our agent, Johnson Trade Development Company, did. You have a copy of it.

Q. Did you ever send purchase orders out yourself?

A. Not that I recall.

Q. Will you identify this, please, Mr. Clerk.

THE CLERK: *U. S. Exhibit number 8,* letter from United States, Region 9, with certificate.

Q. Will you look here at a letter dated, photostatic copy of a letter dated April 15, 1946, signed by Robert Robbins. It is from the War Assets Administration and see if you can recignize that, Mr. Robbins.

A. Yes, sir, this is my signature.

Q. Did you send such a purchase order as is outlined in that letter?

A. That is correct, but for the record now, the other incident we were discussing, Johnson Trade Development Company represented us, on this they did not, they represented us at the time that was being handled, but this is some while later.

Q. Isn't it true that on five or six separate shipments of aluminum, that you submitted purchase orders such as this letter right here for particular lots of that aluminum?

A. I did at this time, in April, the 15th, yes.

Q. Did you get all that aluminum that you ordered there?

A. I don't recall. Evidently, the reason we sent the purchase order because they agreed to sell, I assume.

Q. All right, sir, that, did you say that was a part of that five hundred forty one thousand pounds?

A. I couldn't say, I would have to compare it, just the figures.

THE COURT: What is that exhibit number, Mr. Read?

MR. READ: Number 8, Your Honor.

THE COURT: Number 8, plaintiff's 8, or defendants?

THE CLERK: It is really Plaintiff, United States.

THE COURT: Now, this aluminum, is that pertaining to the Los Angeles or San Diego?

MR. READ: Well, I believe it is all the same, that

Mr. Robbins aluminum was in San Diego, and the War Assets' main office in Los Angeles.

A. That's right, it was Los Angeles. I know we bought aluminum of the San Diego, and Los Angeles and Torrence (?) California out of Los Angeles office.

Q. Isn't it true, Mr. Robbins, that you got shipments of approximately one hundred thirty thousand pounds of aluminum in various orders from San Diego?

A. Well, you have the records there, if you can show me copies of them, I'll confirm it.

Q. Let's see. Will you identify all these, please, Mr. Clerk?

THE COURT: Those records show for themselves. I'm trying to avoid a lot of discussion here about what the records show.

A. Well, he has purchase orders there, he doesn't have sales documents.

MR. READ: Well, Your Honor, what I am trying to show here is that there would be acceptance of any orders or anything of the sort, of any five hundred thousand pounds or five hundred forty one thousand pounds, but this defendant here did make purchase orders of various lots of that aluminum, that were offered in batches, and that the various, that he got sales documents on each one, that he got delivery orders on each one and for each sale there was a documentation, that there were no documentation of the big sales that they claim.

THE COURT: Well, now, we are talking now

about which, in your cross claim here, which item is it?

MR. ROBERTS: Item 13 I believe. I have got a list of letters here where they accepted his offer on a whole lots of this stuff he is talking about. I will be glad to furnish it to him.

A. That is not necessarily the stuff we are talking about. That was stuff sold later.

THE COURT: Gentlemen, let me get a picture of this: If I get one transaction and get a picture of that, it is much easier. We are talking about now Paragraph 13.

MR. ROBERTS: That is Los Angeles.

THE COURT: That's correct, the defendant contends he purchased fourteen thousand pounds.

MR. ROBERTS: That is the wrong one, if the Court please.

THE COURT: We are not talking about that, are we?

MR. ROBERTS: Paragraph 12 is the one we are talking about, I'm sorry.

THE COURT: All right, paragraph 12.

MR. ROBERTS: I put in the San Francisco, that is a mistake. It should have been Los Angeles. I amended at some stage.

THE COURT: That San Francisco is a mistake.

MR. ROBERTS: Yes, sir, it should have been the Los Angeles office.

THE COURT: All right.

MR. ROBERTS: Now, our contention in regard to that, if the Court please, is that they issued this bulletin, that catalog which has been introduced in evidence, known as C-131.

THE COURT: All right.

MR. ROBERTS: List Number C-131, February 12, 1946. We contend we made a written offer to purchase five hundred forty one thousand pounds of that aluminum and Mr. Robbins testified on yesterday that in answer to that, that he got a letter back from them just like Defendant's Exhibit Number 8, which says, your offer to purchase sheet aluminum publicized on our list number C-131, which you submitted to us. Now this was on March 20th, he testified he had one just like this—on this five hundred forty one pounds that has been accepted.

THE COURT: Is that the letter which he says is lost?

MR. ROBERTS: Yes, sir, and if necessary, I'll go to the stand and testify I have made every effort to locate that letter.

THE COURT: Has a notice been given to the War Assets to produce their copy of it?

MR. ROBERTS: It hasn't been, because I talked to Mr. Stephens about it, and he said he had no record of this transaction at all, that he made an effort to find some record of this transaction in the Los Angeles office.

MR. READ: I think we have a record of the trans-

action. We have a record of the decision of War Assets denying the claim filed on the thing.

MR. ROBERTS: We have that, but he said—

MR. READ: There is no documentation of their claim, Your Honor, of there actually being a written contract on this five hundred forty one thousand pounds. There is a documentation of several batches out of that lot that were ordered specifically and individually and they were delivered, to the amount of about one hundred thirty thousand pounds.

THE COURT: I am just talking about this paper.

MR. ROBERTS: This one paper, Mr. Stephens told me he had not been able to locate—

THE COURT: Do you have the testimony of the lawyer out there that he had a paper, he lost it?

MR. ROBERTS: No, but I have written him a letter before and got letters back from him that he didn't.

THE COURT: I see. You are depending on what the lawyer told you about the fact that he saw such a letter?

MR. ROBERTS: Well, he didn't tell me he saw such a letter. He said he did not have it, but he said definitely he sent it to him.

A. Mr. Cohen said—

MR. ROBERTS: Or Mr. Cohen.

THE COURT: It was sent to the lawyer out there?

MR. ROBERTS: There was some idea at that

time, if the Court please, of bringing a suit against the Government in Los Angeles on this one transaction.

THE COURT: I understand.

MR. ROBERTS: That was sent out there for that purpose.

THE COURT: There is no testimony in this case under oath by that lawyer that you had that paper?

MR. ROBERTS: No, sir.

THE COURT: All right.

MR. READ: I don't believe there has been any showing at all;—

MR. ROBERTS: I can put Mr. Cohen on the stand.

MR. READ: Of anything in evidence of any such.

MR. ROBERTS: I can put Mr. Cohen on the stand, where he said he sent it to him, and he hasn't been able to get it back from him.

THE COURT: All right.

MR. ROBERTS: All right, sir.

THE COURT: Now is there any further question of this witness here about this item number, this 12?

MR. READ: Yes, I have a good many questions.

THE COURT: All right, you may proceed.

THE CLERK: Exhibits 9, 10, 11, 12, 13, 14, 15,

for the U. S. exhibits are certificates with the sales slips attached, being photostatic copies.

(U. S. Exhibits 9, 10, 11, 12, 13, 14, 15, marked for identification.)

THE COURT: You say you are tendering those?

MR. READ: I just wanted to get them identified, Your Honor, to get him to—

BY MR. READ:

Q. Will you look at U. S. Exhibit number 9, which is a photostatic copy of a delivery order of a certain batch of aluminum, see if you recognize having seen that, Mr. Robbins?

A. I would assume that I have. This is an invoice. This is a delivery order to us. That is correct.

Q. Incidentally, it may be pointed out here there is a statement of shipment, this invoice was dated May 8th, of '46, 1946, and that designates a date of shipment, shipment one here.

Q. All right, sir. Now, do you know whether or not you submitted a purchase order for that. That says, purchase order number 1022. I believe that was the number.

THE COURT: Mr. Read, lots of this testimony is meaningless to me, unless I know what those papers pertain to. Now, the delivery order dated May 8, '46, does that pertain to the aluminum in paragraph 12?

MR. READ: Yes, sir, to part of it.

THE COURT: That was the part that was delivered?

MR. READ: Yes, sir.

THE COURT: What exhibit number is that?

MR. READ: Here is this exhibit number 8, he identified a purchase order number 1022.

THE COURT: That is plaintiff's 8, or defendant's 8?

MR. READ: Plaintiff's 8.

THE COURT: Plaintiff's number 8 is the delivery order.

MR. READ: Purchase order number 1022, and number 9, that I was just asking him about here, is a photostatic copy.

THE COURT: Let's don't skip around so fast. I'm making notes on these various things here.

MR. READ: Excuse me.

THE COURT: Delivery order, plaintiff's exhibit 8 is on this aluminum in paragraph 12, and it covers that which was delivered? Correct?

MR. READ: On a particular purchase order, yes, sir.

THE COURT: That's right, covers part delivered. All right.

A. You understand that I'm not testifying that this is a part of the purported sale made February 22nd.

Q. Well, can you—

THE COURT: This is not the basis of your cross claim?

A. I am not testifying that at all, because I don't know what this is.

Q. All right, I would like for you to look at the number here listed in exhibit number 8, compare that with the catalog and see whether you can identify that. I don't think it makes a whole lot of difference, Your Honor.

A. They sold sheet aluminum all the time.

Q. All right, sir. See if you can identify these particular numbers as being in that catalog.

MR. ROBERTS: If Your Honor please, I think I can clear this thing up just a little bit. What happened was after this, after they cancelled what we say was the contract of sale to us for five hundred forty one thousand pounds, they then re-offered this same material in smaller lots, and Mr. Robbins bought a number of those smaller lots under that re-offering after they had cancelled it, amounting to some hundred thirty thousand pounds, and that is what those are the orders we are talking about now. I mean we will admit he bought it.

Q. All right, sir. Now, will you stipulate then he or an agent of his, sent a separate purchase order out to the War Assets Administration, out there on each particular batch that was offered? I think that was the situation.

A. Well, evidently what happened, after that first cancellation, or some time later, beginning in April, when they confirmed these sales to us, and asked us to send a purchase order out of Atlanta, this is evidence of that.

Q. Yes, sir.

A. But that was, as you can see from the dates, this

says that that will be sold the tenth day of February, and these are dated in April:

Q. All right, sir. Well, I understand that, I just want to get it clear here that the only sales here that were documented were those that you did receive delivery on, and that there was no documentation of this so-called large sale that that claims, that's what I am trying to get.

MR. ROBERTS: Of course, there, I don't know what he means by documentation.

THE COURT: The documentation of this five hundred forty one thousand pounds is this letter in dispute which they say was turned over to this attorney. Now, there, I'll ask the witness, is there any other documentation of this five hundred forty one thousand pounds except the letter which your Los Angeles attorney apparently lost?

MR. ROBERTS: We have a copy—

A. We have a copy of the order, and we have a deposition taken by Mr. Cohen in Los Angeles of Mr. Johnson, who negotiated it.

THE COURT: Now, Mr. Roberts, you had this witness here, have you gone into that?

MR. ROBERTS: I identified this letter by him yesterday, and—

THE COURT: What is that exhibit number?

MR. ROBERTS: This is exhibit, Defendant's Exhibit number 6, which is the offer to purchase.

MR. READ: It was not admitted, Your Honor; I don't believe there was enough, that is the reason I

have been making all these objections on all these transactions, there have been documentation and I wanted to get the document identified along with each transaction that he testified to. I don't think we can just offer a whole batch of documents here and try to connect them up with some testimony that has been gone over before.

THE COURT: This is going a little bit ragged. I'll take full responsibility for it, if necessary, but I want to say this, there are two ways to try a case before a court, a non-jury case, one is to put it all in, and transcribe the record and let the court then analyze it and make some sense out of it, and the other is for the court to understand it as it goes along. I am frank to say I do not get the full picture of this thing up to this time. Now, the way I had rather do is this: now this is my usual procedure and I think counsel will agree that this makes for much better understanding, is first to take one transaction at the time.

MR. READ: Yes, sir.

THE COURT: And do not, without any notice to the court, run off, start talking about something else to get it confused. Take one transaction, identify the documents, then see what the question is on that. Then move on to something else. Now, I have tried to hold our discussion here this morning to paragraph 12, and it seems that there is still a little confusion on that, but fundamentally, if I see the picture, the basis of this defendant's counter-claim on 12 depends in part on defendant's exhibit 6 which

is an offer to purchase, which I think I have admitted in evidence, I don't—

MR. READ: No, sir, we were arguing about it at the time we closed yesterday.

THE COURT: All right, let's cover that then. I know it was discussed yesterday by this witness. He said it was a purchase order to the War Assets by his agent Johnson.

MR. ROBERTS: Which he said was filed at his direction.

THE COURT: I think it would be in order to put some of these papers in evidence, or tender them.

MR. ROBERTS: I think when Your Honor gets ready, we can just take each paragraph of the cross-claim and I can give you the documents to support each one of those.

MR. READ: Your Honor, we have been talking about documents, and of course the best evidence is the documents themselves, and it seems to me like that as the testimony went along, those documents should be identified, and each transaction cleared up as we went along.

THE COURT: Well, let's try to do it now. I think—

MR. ROBERTS: We will depend, insofar as paragraph 12 is concerned, on Defendant's Exhibit 6.

THE COURT: Now, is there any objection to that?

MR. READ: Yes, sir.

THE COURT: What is your objection?

MR. READ: Your Honor, I don't believe there has been any connection of this, this is, this attached list here shows a whole lot of identifying symbols here that may or may not be in this catalog. We don't know without some explanation as to whether all this aluminum, apparently it is aluminum, amounting to five hundred forty one thousand pounds.

THE COURT: Does it say how many pounds it is?

MR. READ: No, sir, all it says, we are authorized to submit offer to purchase items on our attached list.

MR. ROBERTS: Then it refers to that catalog.

MR. READ: Then refers to that catalog.

THE COURT: All right, I'll admit it subject to being connected, if it does not connect then I will so rule in my findings of fact, but I am going to admit it subject to being connected up.

(Deft. #6 received in evidence.)

MR. READ: I don't object to anything that is properly connected up, Your Honor.

THE COURT: We have got to move along on this case, gentlemen, we have just got to go along in a straight line on this case. Now, have you got any other documents, Mr. Roberts?

MR. ROBERTS: Yes, Defendant's Exhibit 8,

which Mr. Robbins testified to yesterday was the same form as the letter which he received, which had been lost. I will want to put up Mr. Cohen to show somehow that it was lost, in order to get in the secondary evidence, but otherwise, we will want—

THE COURT: That is a copy of the lost letter?

MR. ROBERTS: No, sir, this is a form from the same office in Los Angeles on other purchases, but he says that the letter which he lost, this same form was used.

MR. READ: If you want to put in all of these—

MR. ROBERTS: I'll be glad to put them all in.

MR. READ: All of these, Mr. Roberts?

MR. ROBERTS: I'll be glad to put them all in.

MR. READ: Except instances of various offers or purchase of aluminum in sheets, to Los Angeles, yes, that's what I was talking about.

THE COURT: Do you object to Defendant 8?

MR. READ: Sir?

THE COURT: Do you object to the admission of Defendant's exhibit 8?

MR. READ: No, sir.

THE COURT: All right, let the record show that is admitted.

(Deft. Exhibit #8 received in evidence.)

THE COURT: Now, Mr. Roberts, do you have any other documents?

MR. ROBERTS: Yes, the catalog which has been admitted already, I think, which is defendant's exhibit.

A. Mr. Roberts, I think for clarification, that is a copy of the purchase order that identified all those items there.

THE CLERK: Defendant's exhibit 4.

MR. READ: Would you like for him to explain just what are the papers in there, just for the purpose of having it clarified?

THE CLERK: This was admitted yesterday.

MR. ROBERTS: Yes, that was admitted.

MR. READ: Yes, sir.

MR. ROBERTS: Yesterday.

MR. READ: The catalog was.

MR. ROBERTS: Subject to future—those papers—

THE COURT: You say Defendant's 4 has already been admitted?

MR. ROBERTS: Yes, sir.

THE COURT: All right, let's get any more that are not admitted.

MR. ROBERTS: Defendant's exhibit—

MR. READ: That was already admitted.

THE CLERK: Defendant's exhibits 2, 1, 3, 4, are admitted.

MR. ROBERTS: I am trying to give him now what I am depending on, on paragraph 12.

THE COURT: All right.

MR. ROBERTS: Those are the documents.

THE COURT: All right, you are depending on Defendant's exhibit 6, 8, 4 and 2?

MR. ROBERTS: Yes, sir.

THE COURT: All right.

MR. ROBERTS: Do we want to go into any of the others now?

THE COURT: I'd rather just finish this one transaction.

MR. ROBERTS: If the Court please, I didn't, I am going to offer the deposition of Mr. Johnson in support of that paragraph too.

THE COURT: All right, sir.

MR. READ: Your Honor, this deposition, as I read it, has a considerable amount of material in there that is not only irrelevant—

THE COURT: You can object to it as it comes in.

MR. READ: All right, sir.

THE COURT: Now, if you want to take up by this witness any other items for this, of course you can do so while he is on the stand, but I just want to keep them separate.

MR. READ: I believe I was questioning the witness—

BY MR. READ:

Q. I believe I was questioning you about purchase orders that you submitted for various property out there, do you, did you recognize any of that in plaintiff's exhibit number 8, your purchase order there as being any of the property listed in the catalog C-131, Mr. Robbins?

A. I explained it before, I don't recognize it as such. I recognize it as explanatory. They sent us a letter dated April ninth, telling us we had been awarded this material, and we in turn sent them a purchase order for them.

Q. All right, sir, was that in answer to one of those forms—form letters?

A. That is correct.

Q. In Defendant's Exhibit Number 8?

A. I think that would be what it was. We probably have those forms here.

Q. You usually then did not submit your purchase order until you had that form, that that purchase order had been submitted, is that right?

A. As a matter of explanation, I'll have to go back and repeat myself, I answered that before, initially, when we started purchasing out there, we asked Mr. Johnson to go down and they handled it, as you can see, from the first transaction on that large poundage, I think five hundred forty one thousand pounds. They typed the purchase order up at the time. Now, obviously they have, they began sending out these confirmations to us, and asking us, or we started sending them purchase orders in return for confirmations.

Q. Weren't those confirmations here, confirmations of purchase orders, offer to purchase? Look at the first line in this form letter, defendant's exhibit number 8, your offer to purchase sheet aluminum, and so forth, has been accepted.

A. Evidently on this, Mr. Johnson had made an offer there, they sent the confirmation to us, and for our own records we sent this, which is a confirmation from our own office. Why it was done that way, I don't know.

Q. When did you make any offer of purchase before you got these letters here shown in Defendant's Exhibit Number 8, Mr. Robbins?

A. Beg pardon?

Q. When did you submit any offer to purchase before you got these forms—form letters accepting your offer to purchase?

A. I'm sorry.

Q. You must have submitted the offer to purchase some particular item for them to be accepted.

A. Evidently that was done by Mr. Johnson out there. I don't know whether it was negotiated, or how it was handled. With War Assets it was handled rather informally.

Q. There was documentation of sales, wasn't there?

A. You refer to a sale. These sales agreements are issued after shipment has been made, so I don't think you can ever find a sales agreement.

Q. Do you mean you have got, on any occasion, got shipment of material before the sales agreement had ac-

tually been entered into, and delivery order issued, Mr. Robbins?

A. I think what you call a sales agreement was actually an invoice, if you will look at those copies there, you will find they are actually invoices even though they say sales agreements, all those copies that you have had over there.

Q. What is a delivery order then?

A. I don't know. I never heard of one.

Q. With each one of those sales agreements, was there not certain conditions of sale that was part of each sales document, so to speak?

A. If you will look at them, you will find these conditions of sale that you were talking about on cross examination of Mr. Throckmorton yesterday actually on the invoice, and if there was anything—

Q. Well, they are a part of every sale then, is that correct?

A. An invoice is, yes.

Q. Did you ever file a claim with the War Assets Administration out in San Francisco, Mr. Robbins?

A. I think we did.

Q. Was that claim denied?

A. I assume it was, or we wouldn't be having this problem.

Q. Will you identify this, please, sir?

THE CLERK: Plaintiff's Exhibit Number 16, cer-

tificate with photostatic copy, ten photostatic copies, attached to the certificate.

(Plaintiff's Exhibit #16 marked for identification.)

Q. Plaintiff's Exhibit number 16, will you look there at a letter dated February 15, 1950, to the General Service Administration, apparently with your signature, see if you recognize that, that photostatic copy?

A. Yes, sir.

Q. That the claim that you filed on this five hundred forty thousand pounds of aluminum you are talking about?

A. Yes. Incidentally this will clarify that other thing over there.

Q. All right, sir, as part of this claim, one of these here, did you submit this sheet headed "losses sustained through cancellation of aluminum sheets" on C-1311, did you file that with your claim?

A. Yes.

Q. Does that show, I think it will show for itself, the claim that some amount of pounds were delivered.

THE COURT: Plaintiff's 16, is that it?

MR. READ: Yes, sir.

Q. Now—

A. May I inject something there? At the time we were made the first award, we did advertise and offer to sell, that material. Then some two or three months later, they came back and after they cut it up, they awarded us a part

of that, but we still had additional sales expense involved that I can see from that claim was not taken into consideration.

Q. Now, you filed your claim in 1950, February 15th, 1950, is the date of your letter. Was that claim denied?

A. Yes.

Q. At the time you filed that claim, did you have this letter that you had been talking about that had been lost?

A. No, the papers were sent to the attorney just after the cancellation, and we never got them back.

Q. Did you mention anything to War Assets at that time claiming that you had a—at the time you filed this claim, mention that you had any sort of written documentation at all of that claim?

A. I don't know. I would have to see that—Is that the total claim here—

Q. I think you can tell from your letter there whether or not you can refresh your memory on that.

A. I'm sorry. What was the question?

Q. I think I have got it now. What was it, please sir?

THE COURT: You asked him if that alleged lost letter was mentioned in this claim.

Q. Oh, yes.

A. I don't—

THE COURT: Of course that paper will show for itself.

A. I would have to read this whole thing to tell.

Q. Well, you don't remember mentioning it to them. In other words, did you write the War Assets anything further giving any further information aside from this letter of yours here of February 15, 1950, in which you made that claim?

A. Well, I don't know that, either, Mrs. Lockwood handled the filing of all the claims, and unless you can tell me whether this is the total papers involved in the claim, I couldn't answer the question.

THE COURT: Gentlemen, I think we will pass on from that. The papers will show. No need to ask the witness what is in a paper.

Q. Yes, sir, I just wanted to try to get him to refresh his memory some there.

THE COURT: All right, sir.

MR. READ: Your Honor, so far as a lot of the other testimony of Mr. Robbins is concerned, I am going to have a hard time cross examining him. There was a lot of general testimony there about certain sales, they weren't—certain transactions, they weren't identified, the documents in support of them, although they were testified to, were not identified at the time. I can go ahead and try to get something, I guess, out of some of the general testimony that he made at that time.

THE COURT: I don't follow you at all. I don't even know what you have in your mind.

MR. READ: There was considerable testimony yesterday by Mr. Robbins about various transactions with the War Assets. He mentioned transactions in

Louisville. He mentioned transactions in Detroit, and some in Atlanta. Now there was also testimony so far as various documents—

THE COURT: All right, Mr. Read, let's take it up one transaction at the time. That's what I have been complaining of. The thing is not being made clear. Let's take up any one of those matters and clarify it. Just whichever one you want to take up next.

Q. Defendant's Exhibit number 1, you testified—

THE COURT: Which one are you going into, Mr. Read, in starting—

MR. READ: I'm starting off with Detroit, Your Honor.

THE COURT: That's paragraph 11 of the second defense, one hundred twenty two thousand, seven hundred eighty six pounds of aluminum.

MR. ROBERTS: Yes, sir.

THE COURT: All right.

Q. Now, on that, what do you explain as that tabulation there, Defendant's Exhibit number 1?

A. This is a compiled list of materials which we purchased from the Detroit agency, and they had agreed to sell us, and later cancelled, and this list also shows the companies from whom we received purchase orders for each individual lot of material, and the amounts of the orders.

Q. Did you testify yesterday specifically as to each one of those transactions shown there?

A. We discussed it in a group yesterday. We didn't go into it specifically.

THE COURT: What is the exhibit number there?

MR. READ: Exhibit number 1.

THE COURT: Is that Defendant's Exhibit 1?

A. Defendant's Exhibit 1.

MR. READ: That, we are getting right back to the point I was trying to make, these things were being discussed in a group, and it is just extremely difficult, the documents themselves having not been introduced, or identified at the time, to try to get down anything specific on our own cross examination of these things. They should have been—

THE COURT: Let's run through now, and try to get it specific.

MR. ROBERTS: Defendant's Exhibit number 9, if the Court please, Mr. Robbins testified was all the sales agreements which he had been able to find involving the Detroit transaction.

MR. READ: Your Honor, the Detroit transaction I don't believe can be lumped together. There were separate claims made on numerous transactions. I believe there was testimony that all the claims had been denied.

THE COURT: Gentlemen, does counsel have out of town witnesses in this case which are from out of town?

MR. ROBERTS: I am through with all of mine from out of town.

MR. READ: I think they have all finished.

THE COURT: I am inclined to take this case off, and let counsel go through all this thing, those documents, and make a list of all your exhibits, and a list of the transactions which they pertain to, this, that, and the other. In other words, make up a finding of fact which they are asking the court to adopt. I realize that this is not a jury case, and it was not pre-tried in the way that a jury case should have been, but I, with this many documents, I don't see why there is so much confusion. It looks like somewhere that there would have been a listing of these things under the different counts, or some kind of an organization of the file.

MR. ROBERTS: Of course Mr. Stephens and I tried to do that insofar as these two transactions were concerned, with this, these schedules we got up there.

THE COURT: Mr. Read, you say a lot of documents were referred to, and you don't know what they are, therefore you can't cross-examine the witness I share to some extent that confusion with you, but the only way I see to do is to take these documents one at the time, like we did those others, and run through and try to find out what the bearing is. This defendant, one exhibit he said was a list of companies from which the defendant got orders, I would like to ask the witness if that means orders included in this one hundred twenty two thousand pounds of aluminum, is that what you mean?

A. Your Honor, I think if you will look at this, you will understand and I think the reasons for the cancella-

tion would probably be the same. The purchase orders, we have purchase orders to account for them for the sale. I think Mr. Roberts evidently tried to do that to abbreviate it.

THE COURT: We are talking about—

MR. ROBERTS: Number 11.

THE COURT: This exhibit number blank, plaintiff's exhibit number 6, stricken out, one in pencil, let's put it—

THE CLERK: I will put a number 1 on there.

THE COURT: Put something on here to show what it is.

MR. READ: Your Honor, my whole point, this being matters of the counter-claim, the burden is on the defendant to show in some sort of clarity—

THE COURT: Well, Mr. Read, we are doing the best we can, trying to get it right now.

MR. ROBERTS: I will be glad if Your Honor wants to, to sit down this afternoon and try to put on a piece of paper exactly what I am depending on in each paragraph, in the way of documents.

MR. READ: I think really, probably as far as Detroit and Louisville and Atlanta transactions, there are enough documents there, probably the documents themselves were not connected at the time, or identified, as to relate the testimony with the particular documents.

THE COURT: Well, that is very vague and general. Let's be very, very specific. Defendant's ex-

hibit number 1, now, Mr. Witness, is this or not a recapitulation of offers to buy from you?

A. No, Your Honor, this is a list of materials that we had been awarded by Detroit, when we were awarded this we advertised them in the American Metal Market, and this is a list of the purchasers to buy from us. These, we have copies of purchase orders of this listing, from these companies, offering to buy that material which Detroit had awarded to us, and later cancelled.

BY THE COURT: Well, I understood you to say that. All right. Now, Mr. Read, any further questions you want to ask him on that? I think that is clear, what he stated. The only effect they could have, as I see it, is to illustrate market value of these things on re-sale, so I don't think we need to spend a lot of time on that.

MR. READ: Well, I think probably the same would be true then of Defendant's Exhibit number 2.

THE COURT: Defendant's Exhibit number 2 seems to be the same thing. Now, Mr. Roberts, if you will give us the other exhibits pertaining to this same thing, I believe we can clarify mattters.

MR. ROBERTS: Defendant's Exhibit number 9, sales documents, sales agreements from Detroit.

MR. READ: Your Honor, just a batch of sales agreements without anything more. I am really not trying to be contentious, Your Honor, I hope you understand that.

THE COURT: Well, if you don't understand

what it is, the best thing to do is to ask the witness, and let him explain it. Let me see that, Mr. Clerk—Well, it very clearly seems to be a sales agreement between the War Assets Administration and Associated Metals, shipping instructions, item numbers, number of units, unit price, and total price, I think it very clearly shows what it purports to be. Now, what do you want to ask about it?

MR. READ: Well, this is just, this is a batch of apparently several transactions,—

THE COURT: Well, that has been admitted, has it?

MR. ROBERTS: No, sir, we had tendered that yesterday afternoon, just before we quit, and Your Honor didn't rule on it.

THE COURT: All right.

MR. ROBERTS: Mr. Robbins testified yesterday those were the only agreements he had with the Detroit office on this material. However, he also said that the amounts shown on there were the amounts actually delivered, that those were invoices at the time of shipment, and therefore didn't show the amount awarded.

THE COURT: Well, let's get along, Mr. Read. Let's do something

MR. READ: Well, I object to this on the ground that this is not the entire agreement, Your Honor, they are trying to show some contract here, and they are trying to show some obligation of the Government to pay them some money, they are claiming, trying to claim damages, and just—

THE COURT: All right, I'll admit the testimony. It may not be all, but it may be a part. I'll admit it. Now what other documents do we have on this same item?

(Deft. #9 received in evidence.)

MR. ROBERTS: That's all I have on Detroit, on number 11.

MR. READ: Don't you have some claims—

MR. ROBERTS: If the Court please, I have not been introducing these claims because of the fact they admitted the claims were filed in the pleadings. I'll be glad to do it. I don't think it is necessary.

THE COURT: Let's make reference to it, give it a number so we will know what we are talking about.

MR. READ: Are we still on Detroit?

THE COURT: Yes, we are on Detroit, and you are speaking of the claims that were filed. Let's give it an exhibit number so we can make reference to it.

MR. READ: All right, sir.

MR. ROBERTS: I am afraid I don't have those right at hand, because since it was admitted, I assumed I didn't have to prove them.

THE COURT: Yes, sir.

MR. ROBERTS: If you have got the claims, I will be glad to use your copy.

THE COURT: Gentlemen, take 15 minutes recess.

(Whereupon recess was called at 3 P.M.)

AFTER RECESS

THE COURT: Gentlemen, before we start back into this case, I believe we will save a lot of time, to let this case go over until the completion of the next. Let counsel get out all the exhibits they wish to put in, and show to the other side, and organize it a little better, in a little better shape. I believe we will save a lot of time. There has been a great deal of uncertainty and confusion, and I believe that the procedure will eliminate it. Now, as I say, some district judges require in all cases that each counsel make a list of all the documents in advance, give it to the other side. I have not done that in a non jury case, it does avoid a great deal of confusion, but here we are dealing with a mass of papers involving various transactions, and the very least we can do is this: is to have the documents put together in four piles, each one as to the various transactions, so unless counsel have any real objection to it, I think I will just take this case off, and ask counsel to go through all the exhibits, and let the other side see them, and organize these exhibits, in four different classes at least, concerning—

MR. ROBERTS: There will be five different—

THE COURT: Five different claims?

MR. ROBERTS: Yes, sir.

THE COURT: And I believe if we do that, we can try the case with much less confusion. Then while you are doing that at odd times I want to make a study myself of these exhibits, and so forth, as far as they have gone I think we will save time by doing that.

MR. ROBERTS: I think so too, Your Honor.

THE COURT: I'll give it that direction.

MR. ROBERTS: I want to apologize for not having it better organized. I really thought Mr. Stephens and I had it better organized than we did.

THE COURT: Well, there are lots of documents here, it will take some little work to organize them.

THE CLERK: These have been identified and not admitted.

MR. ROBERTS: With the Court's permission, just let us take them all and divide them up. I think we know which ones have been admitted, and which ones haven't.

THE COURT: That is all right. Let counsel take all the exhibits, admitted or not. It wouldn't hurt to type out a list of those, Mr. Roberts, and—

MR. ROBERTS: I think we will put them in a separate file on each paragraph and put a list on the file with it, out on the outside. We can keep copies of that list too. If the Court please, I might suggest, if the court lets us open these depositions, that we might go over them and see what Mr. Read objects to, and what he doesn't.

THE COURT: That is all right, you may open them. Whose depositions are these?

MR. ROBERTS: Mr. Johnson, in California.

THE COURT: All right, that will be all right.

MR. ROBERTS: I think if we go over it, and let him designate what he wants to object to, that will save a lot of time here in court.

THE COURT: That's right. Then too, those depositions can be somewhat condensed. You can just make a proper mark on there, what is in, and what is out.

MR. ROBERTS: Do I understand Your Honor wants us to come back after the next case? The only trouble, Mr. Read is in the next case.

THE COURT: I will suit the convenience of counsel, I'll be glad to, I'll be here for the next two weeks.

MR. ROBERTS: At the first opportunity Mr. Read and I will get together and report back.

THE COURT: That is all right.

(Whereupon the hearing was concluded.)

MAY 6, 1954

(The case of the United States versus David Center, Robert Robbins, Associated Aluminum Metals Company was called, and the following proceedings were had.)

THE COURT: Are you ready to proceed, gentlemen?

MR. ROBERTS: I think so, Your Honor. I have fixed folders on which is noted which exhibits are contained, and the paragraphs to which they refer, and also the office with which the transaction was alleged to have been had, and the list of documents inside, and the exhibit numbers. Some of them actually haven't been identified. I would like to do that, and supply the number. This is a letter from Associated Metals to War Assets, dated February 21, 1946.

(Letter marked for identification as Deft. Ex. #12.)

MR. ROBERTS: Then the original deposition of Mr. Johnson.

(Deposition marked for identification as Deft. Exhibit #11.)

MR. ROBERTS: Schedule of Detroit transactions.

(Deft. Ex. #1, marked previously, received in evidence.)

MR. ROBERTS: Schedule of San Francisco, it should be the Los Angeles transactions.

(Deft. Ex. #2, previously marked, received in evidence.)

MR. ROBERTS: Defendent's Exhibit Number 3 will not be used as such, it has been broken down into various parts. We will consider number 3 as being withdrawn.

Defendant's Exhibit Number 4, catalog number C-131, four claims on the St. Louis transaction, Deft. Number 5.

(Deft. Ex. #4, Catalog Number C-131, previously marked and received in evidence.)

(Deft. Ex. #5, 4 claims on St. Louis transaction, previously identified and received in evidence.)

Defendant's Exhibit 6, letter from Johnson Trade Development Company to War Assets, dated February 19, 1946.

(Deft. Ex. #6 previously marked for identification and received in evidence.)

Defendant's Exhibit Number 7 can not be found.
Defendant's Exhibit Number 8, 16 letters from War Assets Administration to the defendant or his agent.

(Deft. Ex. #8 previously marked for identification, received in evidence.)

Defendant's Exhibit Number 9, previously marked and received in evidence, nine sales documents covering the Detroit transaction.

(Deft. Ex. #9 marked previously and received in evidence.)

Defendant's Exhibit Number 10, sales document number 6926, of the Atlanta Office, War Assets Administration.

(Deft. Ex. #10 previously marked) and Defendant's Exhibit 11, deposition of James J. Johnson.

(Deft. Ex. #11, marked for identification.)

Defendant's Exhibit Number 12, copy of letter dated February 21, 1946, to War Assets Corporation.

(Deft. Ex. #12 marked for identification.)

Invoice of Associated Metals to War Assets Administration dated May 30, 1946, invoice Number 1618.

(Deft. Ex. #13 marked for identification.)

Next is 9 letters which constitute a series of correspondence in regard to the claim and sales agreements on the Atlanta transactions.

(Marked for identification as Deft. Ex. #14.)

Invoice number 346390 dated May 14, 1946, in re Louisville transactions.

(Marked for identification as Deft. Ex. #15.)

Credit memorandum C-63155 of the Louisville Office, War Assets.

(Marked for identification as Deft. Ex. #16.)

Claim filed by defendant on the Louisville office transaction.

(Marked for identification as Deft. Ex. #17.)

War Assets decision on claims of the Louisville office transaction.

(Marked for identification as Deft. Ex. #18.)

Letter from St. Louis office of War Assets to defendant, dated April 19, 1946.

(Marked as Defendant's Exhibit #19 for identification.)

Decision on claim of defendant on the St. Louis transaction.

(Marked for identification as Deft. Ex. #20.)

Next is nine sales documents, covering transactions in the Detroit transaction.

(Marked for identification as Deft. Ex. #21.)

Next, 14 claims filed by defendant in re Detroit transaction.

(Marked for identification as Deft. Ex. #22.)

Decision of War Assets Administration on claims in re Detroit transaction.

(Marked for identification as Deft. Ex. #23.)

War Assets Administration terms and conditions of sale, dated March 25, 1946.

(Previously marked for identification as Plf. Ex. #7, and received in evidence.)

Plaintiff's Exhibit 8, certified copy of letter dated April 15, 1946, re purchase order 1022.

(Previously marked for identification as Plf. Ex. #8, and received in evidence.)

Plaintiff's Exhibit 9, certified copy sales document number 46659, and credit memorandum C-187709.

(Previously marked for identification as Plf. Ex. #9, and received in evidence.)

Plaintiff's Exhibit 10, certified copy of sales document 46658, credit memo C-17711.

(Previously marked for identification and received in evidence.)

Plaintiff's Exhibit 11, certified copy of sales document 46654.

(Previously marked for identification as Plf. Ex. #11, and received in evidence.)

Plaintiff's Exhibit 12, certified copy of sales document 46656, credit memo C-1099.

(Previously marked for identification as Plf. Ex. #12, and received in evidence.)

Plaintiff's Exhibit 13, certified copy of sales document 46657.

(Previously marked for identification as Plf. Ex. #13, and received in evidence.)

Plaintiff's Ex. #14, certified copy of sales document 46341.

(Previously marked for identification as Plf. Ex. #14, and rec'd in evidence.)

Plf. Ex. #15, certified copy of sales document 46655.

(Previously marked for identification as Plf. Ex. #14, and received in evidence.)

Plf. Ex. #16, certified copy of schedule of enclosures, San Francisco.

(Previously marked for identification as Plf. Ex. #16, and received in evidence.)

MR. ROBERTS: Shall we proceed, Your Honor?

THE COURT: All right, sir.

MR. ROBERTS: I tender, if the Court please, Defendant's Exhibit number 21, which is nine credit memoranda involving Detroit, what we contend were the Detroit undershipments.

MR. READ: Your Honor, I don't necessarily object to these or to any of these other exhibits that Mr. Roberts has here, but I just wonder if maybe there should not be some testimony of identification tying these in with the whole picture. The other day Mr. Robbins testified at length about certain transactions. We did not have all these various documents together, and lined up, at that time, and I just don't know whether the, just to offer all of these without any explanation by any witness, whether it would serve to explain anything or not.

MR. ROBERTS: Well, insofar as the Detroit transactions are concerned, if the Court please, we agreed in pre-trial that this schedule showed the proper document numbers, as I remember them, and we have introduced the documents, and these credit memoranda, which I am now introducing tie in with those document numbers, up here. I really don't think there is any reason to identify that. Now the claims I think Mr. Robbins identified, I'll be glad to go back over and offer them again, which is the next exhibit I wanted to tender.

THE COURT: Mr. Read, we could admit them subject to motion to rule out any of them at any time before the findings of fact are made up. If various ones have already been identified by the witness as to that, I don't know, it will take a good deal of time to check back and ascertain that fact.

MR. READ: Certainly.

THE COURT: The quickest way might be if you have any one in court to identify them, Mr. Roberts,

would be to give a batch to the witness and let him look through, swear that they were the original documents, if he knows.

MR. ROBERTS: If the Court please, I thought a good deal about this case, I really don't see how Your Honor is going to intelligently pass on it without having the evidence written out, and at least without certainly an outline with briefs filed of our contentions and—

THE COURT: What I was hoping to do was this: there are five different transactions here, was to get a little summary written out, as to the findings of fact that you are asking me to adopt as to each of these things, and number those findings seriatum, from 1 on up. Then discuss with counsel as to what the evidence shows on each one. Now that might narrow it down. My experience has been that from the documents and notes that I take, and the memoranda of the documents of each one, as to what the witnesses say, I can generally arrive at a finding without having the whole record written out. Now on occasions there are certain parts where my recollection and counsel's may not cover it. There may be a disagreement as to what a witness swore where I have to go to the record.

MR. ROBERTS: The reason I brought it up at this time, I just thought if we were going through the procedure I sort of had in mind, we could include these objections to the documents in that same—just admit all the documents subject to later objection on both sides. Then we could make the objections either orally or in brief form.

THE COURT: Well, there is this: those documents either have to be agreed to by Mr. Read, or your witness will have to say they are genuine.

MR. ROBERTS: Some of them don't need any identification, where they came from plaintiff and are identified by plaintiff's numbers, letterheads, things like that.

THE COURT: Do you have them divided according to the different transactions?

MR. ROBERTS: Yes, sir, I have all of them in a separate folder with a list on the outside.

THE COURT: Let's take one as a beginning, you might say, and try it out and see how it works. Which one—

MR. ROBERTS: We might start with paragraph 11, which is the Detroit transaction.

THE COURT: All right.

MR. READ: Of the cross bill, Defendant's Exhibit 1 has already been admitted. As I understand it, all of these have been admitted subject to future objection.

THE COURT: All right.

MR. ROBERTS: Defendant's exhibit number 9 has been admitted under the same circumstances. Defendant's exhibit 21, which is what I just tendered, the credit memoranda from the Detroit office, which we say shows the undershipments, and which tie in by document numbers shown on them with the document on the original schedule, and with

the documents introduced here. I don't think we need any identification by anybody. I think they are very obviously relating to the same transaction, and can come from the plaintiff—

THE COURT: Is that—

MR. READ: Mr. Roberts and I were laboring under the difficulty that we have a whole lot of documents here that we want to get in, and neither one of us is making a strict objection as I think we ordinarily might have, if we were trying the case out at length.

MR. ROBERTS: May it please the Court, the main thing we both want to get in is all the documents which will illustrate any transactions—

THE COURT: Let's take Defendant's Exhibit 1.

MR. ROBERTS: That is admitted.

THE COURT: What about number 9?

MR. ROBERTS: That has been admitted.

THE COURT: What about 21?

MR. ROBERTS: 21 is just what I have just tendered of course I will be glad to put Mr. Robbins up and show he got that from War Assets, but I think it is so obvious—

THE COURT: All right, Mr. Read.

MR. READ: Will certainly agree it came from War Assets, Your Honor, as far as agreeing on the record as to what it would illustrate.

THE COURT: Let's don't go into that, because

what they illustrate would be a matter of argument and conclusion. I am going to admit Defendant's Exhibit 21.

(Deft. #21 received in evidence.)

MR. ROBERTS: Defendant's Exhibit 22, is carbon copies of 14 claims which I think Mr. Robbins identified as claims he filed with the General Service Administration and War Assets Administration when he was on the stand before. If there is any doubt about it, I can put him back up there for that purpose.

THE COURT: All right, let's put him back.

MR. READ: We can probably stipulate that claims were made and denied on all these transactions, I expect.

MR. ROBERTS: I think it would be well to put the claimant's action in there.

THE COURT: All right, let's put Mr. Robbins back on the stand then.

MR. ROBERT ROBBINS: Resumes the stand for further examination.

DIRECT EXAMINATION

BY MR. ROBERTS:

Q. Mr. Robbins, I hand you Defendant's number 22, and ask you to look through that and tell me what these are copies of.

A. These are copies of our letters to the War Assets

Administration in regard to claims made by us that have been denied. Now, wait, let me look further—I am not certain they have all been denied.

THE COURT: All we wanted at this time is just what those are copies of, of the originals.

A. Yes, sir. These are copies of letters we filed in regard to claims with War Assets, sir.

THE COURT: All right.

Q. Written by your company?

A. By our Associated Metals.

Q. I'll hand you Defendant's Exhibit 23.

THE COURT: Do you now tender number 22?

MR. ROBERTS: Yes, I tender that at this time.

THE COURT: Do you object to it, Mr. Read? Are all of these Detroit transactions, Mr. Roberts?

MR. ROBERTS: Yes, sir.

MR. READ: I think not, Your Honor.

THE COURT: All right, I'll admit them, if you later want to make any objection I will go into it again. Let's take up the next one now.

(Deft. Ex. #22 received in evidence.)

Q. Defendant's Exhibit number 23, what is that?

A. That is a letter that we received from War Assets that denies a total of fourteen claims made by us.

Q. You received that from War Assets?

A. That's right.

Q. And what transaction is that in connection with?

A. Well, now, I don't know if we received this, or if this is a copy of what we received.

Q. Well, it doesn't matter.

A. It is addressed to us from War Assets, and it is signed so I assume that is a copy we received.

Q. Is that in connection with the Detroit transaction?

A. Yes.

Q. We tender that, if the Court please.

THE COURT: All right.

(Deft. Ex. #23 received in evidence.)

MR. READ: That is the decision on all fourteen of them.

THE COURT: All right, that is admitted.

Q. Now that completes my exhibits to paragraph 11, if the Court please. I'll try to keep them in a separate folder with a list on the outside for each one.

Q. Mr. Robbins, I hand you defendant's exhibit— excuse me just a minute. Now the nex one we take up, if the Court please, is paragraph 12, which is the Los Angeles transaction, defendant's 6 and 7 have already been admitted.

THE CLERK: 7 was withdrawn.

MR. ROBERTS: It is 2 and 6, I'm sorry.

THE COURT: That is referred to in paragraph 12?

MR. ROBERTS: Paragraph 12, yes, sir, 2, 4, and 6 and 8 have already been admitted under the same provision that later objection can be made to them.

THE COURT: Yes.

Q. I'll hand you defendant's exhibit number 12, Mr. Robbins, and ask you if that company wrote that letter, I mean wrote the original of which this is a copy to War Assets Administration?

A. Yes, this is a copy of a letter written by us to War Assets.

Q. I tender that exhibit number 12, if the Court please.

MR. READ: I have the original of that, Your Honor. I have no objection to that going in.

THE COURT: That is admitted.

THE CLERK: May I have that, please?

(Deft. Ex. #12 received in evidence.)

MR. ROBERTS: The only other document on paragraph 12 is the deposition. I think we had better leave that to the last because somehow or other we are going to have to go through that.

THE COURT: All-right, sir.

Q. Now, the next is paragraph 13. Mr. Robbins, I hand you Defendant's Exhibit number 19, and ask you if you received that from War Assets Administration?

A. Yes, we did.

Q. That came from your file?

A. Yes.

Q. Now, we tender that one, Defendant's Exhibit number 19.

MR. READ: No objection.

THE COURT: Admitted.

(Deft. Ex. #19 received in evidence.)

Q. Then I hand you Defendant's Exhibit number 5 and ask you if you wrote those letters to War Assets, if those are copies of letters you wrote and mailed to War Assets Administration.

A. Yes.

MR. ROBERTS: We tender Exhibit number 5, if the Court please.

MR. READ: No objection.

THE COURT: Admitted.

(Deft. Ex. #5 received in evidence.)

Q. I hand you Defendant's Exhibit number 20, and ask you if you received that from War Assets Administration?

A. Yes.

Q. That is the decision on them.

MR. READ: No objection.

THE COURT: Admitted.

(Deft. Ex. #20 received in evidence.)

MR. ROBERTS: Your Honor, that next is on paragraph 13—that last is on paragraph 13. The next is paragraph 14.

Q. I hand you Defendant's exhibit number 10, Mr. Robbins, and ask you if that is the invoice you received on the, from the War Assets on the Atlanta transaction?

A. Yes.

THE COURT: 14 is the Louisville transaction.

THE CLERK: Number 10, Your Honor, he is exhibiting now.

Q. Paragraph 14, I thought, was the Atlanta— Yes, sir, I just got it reversed on the outside of this document.

While I am on 5, if the Court please, I'll go ahead and finish it since I have identified it.

THE COURT: That Defendant 10 is on Atlanta, is it?

MR. ROBERTS: On 15, yes. I hand you Defendant's exhibit number 12 and 13 and ask you if that is the invoice you sent War Assets in regard to the Atlanta transaction?

A. Yes.

Q. And I hand you Defendant's Exhibit number 14, which is a series of correspondence, and ask you if that consists of letters you received from War Assets and answers you made, and copies of answers you made to War Assets in regard to the Atlanta transaction?

A. Yes.

MR. ROBERTS: I tender number 10.

MR. READ: No objection to 10.

THE COURT: Admitted.

(Deft. Ex. #10 received in evidence.)

MR. ROBERTS: I tender number 13.

MR. READ: No objection.

MR. ROBERTS: No objection to 13?

THE COURT: Admitted, number 13 is admitted.

(Deft. Ex. #13 received in evidence.)

MR. ROBERTS: I tender number 14, Your Honor.

MR. READ: No objection to 14.

THE COURT: Admitted.

(Deft. Ex. #14 received in evidence.)

Q. I hand you Defendant's Exhibit number 15, and ask you if that is an invoice you received from the Louisville Office of War Assets Administration?

A. Yes.

Q. I'll hand you Defendant's Exhibit number 16, and ask you if that is a credit memorandum which you received from the Louisville Office of War Assets Administration?

A. Yes, sir.

Q. And I'll hand you Defendant's Exhibit number 17, and ask you if that is a copy of a claim you made to the Louisville Office of War Assets Administration?

A. Yes.

Q. And I'll hand you defendant's exhibit number 18, and ask you if this is a decision on that same claim made by War Assets Administration.

MR. ROBERTS: We tender exhibit number 15, and you can see that has some terms and conditions of sale on the back, there was 11 of them. Do you have the original of that? I don't have anything more in my file— If the Court please, at one time I had the original of this, and I tried to find it. This is a photostatic copy I made for the Government in response to interrogatories. I will do my best to find the original again. I might have it in my file somewhere.

MR. READ: Those terms and conditions on the back are like certain others of our exhibits here.

MR. ROBERTS: I am satisfied they are. I will tender it with this stipulation; if I can't find the original, I'll agree they are the regular terms and conditions that are normally on these documents.

THE COURT: Is that agreeable with Mr. Read?

MR. READ: As long as it will be clear there is something on the back that does [illegible] vernment, and I believe what he said will cover it.

THE COURT: All right, I'll admit 15.

(Deft. Ex. #15 received in evidence.)

MR. ROBERTS: We tender number 16, which is a credit memorandum.

MR. READ: No objection to 16.

THE COURT: Admitted.

(Deft. Ex. #16 received in evidence.)

MR. ROBERTS: I tender 17.

MR. READ: No objection to 17.

THE COURT: Admitted.

(Deft. Ex. #17 received in evidence.)

MR. ROBERTS: And I tender 18. That is the decision.

MR. READ: No objection to 18.

THE COURT: Admitted.

(Deft. Ex. #18 received in evidence.)

MR. ROBERTS: That is all the documents, if the Court please, with the exception of the deposition, and I don't know, those depositions, I don't know just how we are going to get at the objections to those unless Mr. Read and I read them to Your Honor and make them as we go.

THE COURT: Yes.

MR. ROBERTS: I would like to finish the oral testimony before we go into that, if it is all right with Your Honor, particularly since Mr. Cohen

has to be out of town tomorrow, and I didn't want to—I wanted to prove one thing by him while he is here.

THE COURT: All right, in examining this witness on this, try as best you can to let me know which transaction they are speaking of.

MR. ROBERTS: I don't believe I have any further direct of Mr. Robbins, but Mr. Read had not finished his cross examination, as I remember it.

MR. READ: Yes, I think that is correct, Your Honor.

THE COURT: All right.

CROSS EXAMINATION

BY MR. READ:

Q. All right, sir.

I went over the California deal to some extent the other day, I believe, on cross examination, Your Honor, but I would like to take that up first with Mr. Robbins on cross examination just to keep that straight.

THE COURT: Yes, all right.

MR. READ: Could I get the documents that have been admitted here in that connection, Mr. Clerk, on the California transaction.

THE COURT: That is 2, 4, 6, 8, 12, on the California transactions.

Q. Now, Mr. Robbins, look at Defendant's Exhibit

number 6 there, copy of the letter to the War Assets Administration from Mr. L. M. Johnson, has a list attached to it of certain items apparently from that catalog number C-131. Are any of those items the same ones that were in the letter of February 22nd that you talked about that Mr. Johnson gave to the War Assets in which he made, you said, an order of some five hundred forty thousand pounds of aluminum?

A. Yes.

THE CLERK: Government's Exhibit for identification 17, certified copy of communication signed by J. M. Johnson, to Associated Metals, dated 2-22-46.

THE COURT: What is the number of that?

THE CLERK: Number 17, Your Honor.

(Plf. Ex. #17 received in evidence.)

Q. Will you look here then at U. S. Exhibit number 17, and compare those two lists and see whether or not any of them have the same items.

A. Yes, I know they do, without looking. Yes.

Q. They do have some of the same items from that catalog, is that correct?

A. Yes.

Q. All right, sir. Now, would you know they are, looking at Defendant's number 6 again, that this list has certain numbers there, I suppose that refers to the, cer-

tain numbers of items in that catalog, that is correct, isn't it?

A. Yes.

Q. Now, do you know what the total amount of aluminum in both poundage and price are represented by this attached list here? Number 6?

A. No, I don't know what it is represented here.

Q. Do you know whether or not you received any of the items that are shown in that particular order, in Defendant's number 6, that is?

A. Not on this first purported sale, we didn't.

Q. What do you mean by this first purported sale?

A. Well, this is a copy of a letter that our representative, our agent, Mr. Johnson, sent to War Assets, and it is an offer to purchase these lot numbers. Now, these are—this that you have here—

Q. Number 17, plaintiff's number 17.

A. Number 17, is the lot numbers out of this catalog that we contend were awarded to us, and then later cancelled.

Q. All right, sir.

THE CLERK: U. S. Exhibit for identification 18, certified copy of letters from Johnson to War Assets Administration, dated February 19, 1946, and reply thereto, dated February 21, 1946, re California.

(Plf. Ex. #18 marked for identification.)

Q. Will you look here at U. S. Exhibit number 18, Mr. Robbins, and look at the first letter there, dated February 19, 1948, does that appear to be a photostatic copy of the original of this letter, Defendant's Exhibit number 6?

A. Yes.

Q. All right, sir, would you look, turn on over to the list attached thereto, that the same list here shown attached to this letter?

A. Yes.

Q. Defendant's Exhibit Number 6?

A. Yes.

Q. Now, would you look at the third sheet in this plaintiff's exhibit number 18. Now, is that a copy of a letter that you yourself wrote to War Assets?

A. Yes.

Q. All right. Will you look here first at Plaintiff's Exhibit number 9, which appears to be a copy of a certain sales document from Los Angeles, shipped to, a certain amount of aluminum, thirteen thousand, nine hundred six pounds, shipped to Assorted Metals, in Atlanta?

A. Yes.

Q. Do you have, or have you ever had the original, the first sheet of that particular sales document, Mr. Robbins?

A. I assume that we have.

THE COURT: Let me see that plaintiff's Exhibit 9.

MR. READ: Plaintiff's 9, yes, sir.

THE COURT: And it refers to Atlanta.

MR. ROBERTS: That is plaintiff's exhibit number—you are thinking about Defendant's—

THE COURT: Plaintiff's Exhibit 9, does it refer to Atlanta?

MR. READ: It is a sales document, Your Honor, that shows the name of the buyer, as Assorted Metals, and is from Los Angeles, War Assets Administration, Los Angeles.

THE COURT: From Los Angeles? Does it have anything to do with Atlanta?

MR. READ: No, sir.

THE COURT: All right.

MR. READ: I just mentioned that to show it was Associated Metals here in Atlanta that was involved.

A. That appears to be a copy of an invoice from War Assets to us, and I assume that it is correct.

Q. All right. Now will you look here at this catalog (Deft. 4) and then look here at your Mr. Johnson's letter, this is exhibit number 17, see whether or not the items shown on there are in the catalog and whether or not any of them are also on this purchase list of the 22nd of February, 1946, U. S. Number 17?

A. Well, now, I have no way of being able to identify serial numbers. The War Assets established certain serial numbers to certain materials, and I have no way of knowing whether they were continuing numbers or not. Now,

I see a number here that is als on this sheet, I have no way of knowing what that—whether that is the same material, I think it has been surmised that the materials shipped here was a part of that material, which we contend was cancelled. Now, let's see. I think we can check a little further here. Yes. Now, this appears to be the same lot number and the same—

THE COURT: When you say that, if you don't mind, when you say this, show some number so the record will show.

A. All right. This delivery order—

THE COURT: Give the exhibit number on there, please, sir.

A. Plaintiff's Exhibit number 9, appears to be the same lot number as the material which was in a lot that we were advised had been sold to us back in February. Now this—

Q. That is as shown in the list, and U. S. Exhibit number 17, is that correct?

A. Yes, sir, that's correct.

Q. All right, sir.

A. Now, this plaintiff's exhibit number 9 is dated three months, May 8, 1946, which was two and a half months later, and I—

Q. Did you receive that shipment?

A. Yes.

Q. And you don't know where the original of that

sales document is? Sales document number 4646, 466659 here, shown in U. S. Exhibit number 9?

A. No, I don't.

Q. Do you know whether or not it may have been, identified in the particular conditions of sale on the, written on these conditions of sale that appeared on some other document here?

A. No, I don't.

Q. If you had them here, of course we would probably be able to tell.

Q. All right. Look here at Plaintiff's Exhibit number 10. Do you see a photostatic copy of the same document, 46658? Would you look at the item number, serial number there, and see whether that coincides with any of the particular items shown in the February 22nd letter, of Mr. Johnson's?

THE COURT: Are you still talking about Los Angeles?

A. Los Angeles, yes.

Q. That does coincide with some of those numbers there?

A. Yes.

Q. Did you receive shipment on this sales document here, shown in Plaintiff's Exhibit Number 10?

A. I'm sure, quite sure we did.

THE COURT: Now 10 coincides with what, Mr. Read? What number?

MR. READ: This is another one, just another sales document, is plaintiff's number 9, that was also a sales document.

THE COURT: You handed him U. S. Exhibit 10, and said do some of these items coincide with something else.

MR. READ: Oh, yes, with U. S. Exhibit 17, February 22nd letter in which the five hundred forty one thousand pounds—

THE COURT: Yes, if I go through this record, and it says this and that and the other, it means absolutely nothing to me, I have to have the numbers to ever make anything out of this testimony.

MR. ROBERTS: If the Court please, we might shorten this by—we are perfectly willing to stipulate that we did buy later, about a hundred thirty to forty thousand pounds of this same material, when it was re-offered for sale, which was after they had cancelled our sales that it was re-offered in small lots, and I'm willing to stipulate that we did buy them and these are the sales documents on which they were delivered. I mean it will just save going through all that.

THE COURT: That's what you are claiming, Mr. Read?

MR. ROBERTS: And that was part of this material, same material.

MR. READ: Your Honor, what I had in mind was that this was part of the same material. These are only part of the documents here, involved, in that

hundred thirty thousand pounds that we contend was actually sold and I believe in one of our exhibits was actually claimed by the, shown in the claim of the defendant as having been purchased by them. It is shown in Plaintiff's Exhibit 16, in this defendant's claim to the War Assets Administration. What I had in mind more particularly, was we have here photostatic copies of part of the documents. That is part of these sales agreements that it has been testified several sheets came together, they were all made out, one of them was a sales agreement, and we expected on the back of each one of those sales agreement that went to the purchaser, there were certain conditions of sale. Now, what I was getting at was having him to testify that they did make all these purchases here on these particular invoices, and unless they are able to bring the originals which I would consider governing in the case, which I believe would have those conditions of sale here, I don't believe they will be able to make out a case, and I think it does have a definite bearing on the claimed sale of aluminum out in California.

THE COURT: Let Mr. Roberts give there what he contends are the exhibit numbers which apply only to the resale and not the sale on which they are predicating a breach. That mighty simplify it.

MR. ROBERTS: Exhibit number 8. Well of course this is, both our original sale and the resales were taken from this letter, this list, number C-131, which is Defendant's Exhibit number 4. I mean that was the catalog in which they were offered.

Then Defendant's Exhibit number 8, we think shows the acceptance of our offer to buy all this property on resale. I am not sure that is all here, but we think it is.

THE COURT: Now, if this is an acceptance your offer to buy on resale, that is not the basis of your counterclaim, is it?

MR. ROBERTS: No, sir.

THE COURT: All right.

MR. ROBERTS: We are perfectly willing to admit these amounts here were delivered and these sales documents represent that Mr. Read is talking about now.

THE COURT: Now, let's see what other documents here refer to the resale, not to the original sale.

MR. READ: On the resale, did you say, Your Honor?

THE COURT: See which one of these documents refer to the resale and not the original sales, that is very important to separate those.

MR. READ: Plaintiff's exhibit number 9 through 15, of course as far as that being a resale, Your Honor, I think that is entirely a conclusion. I don't—

MR. ROBERTS: I think the evidence shows it, Your Honor.

THE COURT: It is very important, Mr. Read, the defendants claim they bought something they

didn't get, claim damages which they didn't get, then they claim other things on the subsequent sales which were delivered without dispute. Now, if I get it clear on what was sold on resale, and what was breached, it would make a material difference.

MR. ROBERTS: The only reason I brought it up about the resale business, and I think it is material for this and nothing else—we claim the original sale we bought five hundred forty one thousand pounds which they cancelled some time about the middle of March. Then on instructions from Mr. Throckmorton, who was here, he testified it was re-offered in smaller lots and we went back and purchased some of those smaller lots. Now, I think where we go back and purchase it, and have it delivered, and use it, or resell it, or do whatever we do with it, we have got no right to counterclaim on the basis of what we purchased in those, because we went on and bought them, although we may have bought them for a little more money than we did originally, I think when we went back and bought those smaller lots, we wouldn't have any right on that material to base any counterclaim.

THE COURT: So you are eliminating from the counterclaim the amount bought—

MR. ROBERTS: That is set out in the answer, that is, we bought 541,745 pounds of aluminum, and 130,950 pounds were delivered, and therefore we counterclaim on the difference in the amount which is shown in defendant's exhibit number 2 to be 410,795 pounds net.

THE COURT: Under that statement I am not so much concerned as to whether the invoices show delivery under the original contract or under resale.

MR. ROBERTS: That's right.

THE COURT: I see.

MR. READ: Your Honor, I believe it is very important here, whether you call it a resale or what, I think it is very important to get the—if you have any documents governing any transactions out there at all, I think it is very important to have them, because our main contention is there were actually no sale, no contract, until these sales agreements were entered into, that we believe that on the back of the original that went to the purchaser of each one of these sales agreements, which was more or less in the form of an invoice, but was also the sales agreement, we believe that those govern, and that those terms and conditions of sale on the back are the original, are the only terms and conditions that govern the sales whatsoever. They are the only contracts that there were.

THE COURT: Now, what are the general conditions of those sales agreements, where were they shown?

MR. READ: We have them here in some of plaintiff's exhibits, Your Honor. I think here, for instance, in plaintiff's exhibit number 5, on the back here of this—

THE COURT: Plaintiff's 5?

MR. READ: This particular sales agreement, headed "Conditions of Sale."

THE COURT: That is U. S. 5?

MR. READ: Yes, sir, U. S. Number 5.

MR. ROBERTS: If the Court please, of course—

THE COURT: Well, we are talking about two different things, Mr. Read is talking about whether there is any original sale, and I am talking about, assuming there was, assuming there was an original sale that the defendant is waiving any claim where they bought the goods on a subsequent sale, any claim for that. So I think we are all together.

MR. ROBERTS: I believe defendant's exhibit number 8 shows clearly there was a subsequent offer and acceptance made on that same material. It gives the date of the offer, and the acceptance, and the amount of material and the numbers and I think it will correspond to the same documents which he had.

MR. READ: Your Honor, unless we have all the documents that have to do with these particular transactions, I don't believe that there is any—I don't believe that the defendant can show a case on its counterclaim, just by showing some of the documents.

THE COURT: Well, in the first place, I can't say whether they are all, and in the second place, I can't—I am not deciding the case at this time.

MR. ROBERTS: Your Honor, under our theory the resales don't have anything to do with it, and the only reason we put them there is to show the

difference between the original amount and what we are claiming, and why.

THE COURT: It looks to me like it would be to the benefit of the Government to show resales because if he ordered even ten thousand pounds, and the Government accepted it, and if there was a binding contract and if there was a loss on the ten thousand, the only effect of these others would be to reduce the amount of losses claimed.

MR. READ: He is not claiming for these anyway, Your Honor.

THE COURT: All right.

MR. READ: For the hundred thirty thousand. He is just contending for the difference between the hundred thirty thousand and five hundred forty one thousand.

THE COURT: All right, let's complete the testimony then.

MR. READ: Mr. Roberts, we were talking about some kind of stipulation there, what was our stipulation—that these documents here, plaintiff's number 9 through 15, I believe, are part of the documents governing the sale of ten thousand odd pounds that were actually sold?

MR. ROBERTS: That's what I will stipulate, that these documents are part of the material which we claim was resold, which were actually delivered, would probably be the best way to put it.

I will be glad to state in my place, if the Court please,

I have made every effort to find the original of those documents he was asking about. Apparently they were sent to the lawyer in California along with these other documents we are talking about, and we have not been able to get them back. I don't know where they are. I have made a diligent search through all Mr. Robbins' records, and I have not been able to find any of those documents, but I think it is, at least under our theory of the case, it is immaterial what kind of materials—what kind of terms and conditions they had on the back because we say they don't have anything to do with the transactions which we are claiming on at all. They are subsequent transactions.

THE COURT: Let's complete the record on the evidence. You may proceed and examine the witness.

MR. READ: All right, sir.

BY MR. READ:

Q. Did you, Mr. Robbins, you made a claim to the War Assets Administration for the Aluminum that you claim was sold to you out there and that you did not ever get?

A. I think that we have that. If I could have copies of it, I think I could be more specific.

Q. All right, here in plaintiff's exhibit number 16, letter dated February 15, 1950, appears to be signed by you. Is that—will you state whether or not that is the claim that you made?

A. Yes.

Q. Attached to that letter are certain—

A. Itemized figures—

Q. Figures and itemizations there.

A. The amount of the profits that would have been, had it not been cancelled on us.

Q. All right, you show in your claim that you were delivered the hundred thirty thousand, nine hundred fifty pounds of that aluminum?

A. Yes, sir.

Q. What you claim for is actually four hundred ten thousand, seven hundred ninety five pounds of aluminum, is that correct?

A. That is correct.

Q. Was your claim sustained or was it denied?

A. Denied.

Q. There is another, the first paper here, plaintiff's exhibit number 16, appears to be a decision on a claim, dated, Designation, dated February 15, 1950, is that the decision turning down your claim on that four hundred ten thousand pounds of aluminum?

A. Yes.

Q. Mr. Robbins, would you agree that on the original sales agreement, on each of the shipments of a hundred thirty thousand odd pounds, that you got that these were standard conditions of sale, such as shown in plaintiff's exhibit number 5, on the back there, that shows conditions of sale right there.

A. Mr. Read, so that the court won't be confused, I, this is not a standard sales agreement at all. This is a sales agreement of some sort, a document that is called—from the Philadelphia office, I think you will find from your record is different from that handled by other offices.

Q. I was asking you if they were conditions of sale such as that that might be on the original of the document that you got on the shipment of 130,000 odd pounds that you did get from California.

A. I have no way of answering that.

Q. You wouldn't know unless you actually had the document here. Then were you—

THE COURT: Isn't the real question what the conditions were on the five hundred forty one thousand pounds which he purchased, which he first ordered, that's what he claims a loss on, is it not?

MR. READ: Yes, that's what he is claiming his loss on, but—

A. Well, this is, each, as I recall it varies. War Assets Agency had different type of document, and I think that is substantiated by the documents themselves, they are different, as I recall, from the ones here. This is out of Philadelphia. Now, this says sales document, but what you had over there were invoices that were made up and sent to us after the material had been shipped. So, I don't think the conditions made very much difference in this regard.

Q. Did you not get an invoice that had on each sales you ever had with War Assets Administration that had

some kind of conditions on the back, whether you got it before or after?

A. No, we have some here that are perfectly blank on the back, on invoices, some had conditions, and some didn't.

THE COURT: Just a moment, gentlemen, can anybody tell me whether, when the defendant here bought this five hundred forty one thousand pounds through the Los Angeles Office of War Assets, there wasn't any evidence, evidencing the alleged contract for that amount of aluminum.

MR. READ: No.

MR. ROBERTS: Our position is, if Your Honor please, that that catalog which is exhibit number 4, Defendant's Exhibit number 4, was issued offering this property for sale. That we—

THE COURT: Are those conditions in the catalog?

MR. ROBERTS: Now what he is talking about, no, sir. There is some general information in the catalog, and that is all.

THE COURT: Well, is there any paper in connection with this Los Angeles matter that contains any conditions?

MR. ROBERTS: Our position is there was not.

THE COURT: What did the paper show?

MR. ROBERTS: That's what I was going to tell you, this catalog, defendant's number 4, was the

original offering by War Assets. We wrote them a letter, identified as Defendant's Exhibit number 6, that is our agent did, making them an offer on certain items out of that catalog, which are attached to that by a list. We also, Mr. Robbins wrote them a letter, identified as Defendant's Exhibit Number 12, which said that he was in receipt of a copy of that offer, and advising them that Johnson Trade Development Company was acting as their agent, that is War Assets.

MR. READ: There is also, may I interrupt? That is also shown in U. S. Exhibit number 18, the original of that letter of Mr. Johnson to the War Assets with the attached list, and the original of the letter of Mr. Robbins of February 24th. They are all shown in U. S. Exhibit 18.

MR. ROBERTS: We also claim, if the Court please, that we received from War Assets Administration a letter accepting our offer on the five hundred forty one thousand pounds, which we have lost, which we are attempting to prove by parole, and we are not depending on this entirely, because we say under these depositions of Mr. Johnson, even if we had not had that letter, when he went into the office and they accept his offer orally, that would constitute a contract also.

THE COURT: Let's see, now, you say the letter which he, you say was lost?

MR. ROBERTS: Yes, sir.

THE COURT: Was that the letter making the offer?

MR. ROBERTS: No, sir, that is a letter which Mr. Robbins testified was on this same form as these letters in Defendant's exhibit number 8 that he received, another five hundred forty one thousand pounds, which he said he sent to the lawyer in California, and the lawyer in California lost the letter, but that he received it, that letter from the War Assets accepting that offer on the five hundred forty one thousand pounds. We are not depending on that letter entirely. We are also depending on Mr. Johnson's testimony, and he went in there and it was orally accepted, and either one is sufficient to establish a contract.

THE COURT: Now, the defendant 8 is the offer?

MR. ROBERTS: Now, we, our offer is defendant's exhibit number 6 and 12, and we are attempting to prove by parole that we received a letter on the same form as Defendant's exhibit number 8, accepting the five hundred forty one thousand pounds, offer from War Assets, and we say that is the contract; that as far as we know, there has been no sales, these so-called sales documents ever issued on that transaction.

THE COURT: I see.

MR. READ: I think that is about all on the Los Angeles transaction that I wanted to cross examine him about. I think we can go through another transaction now.

THE COURT: All right. * * * Gentlemen, I expect we had better take a little recess. Which one will you take up next?

MR. READ: I thought I would take the Detroit, paragraph 11 of the cross counterclaim.

THE COURT: All right, let's recess about 15 minutes.

(Recess called at 3 P. M. for 15 minutes.)

AFTER RECESS

MR. I. T. COHEN: Having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROBERTS:

Q. What is your name?

A. I. T. Cohen.

Q. Are you a practicing attorney in the City of Atlanta?

A. I am, sir.

Q. Have you represented Associated Aluminum and Metals Company and other defendants in this case since its inception in this matter?

A. I have, sir.

Q. Did you see an acceptance from War Assets Administration addressed to Associated Aluminum, or Johnson Trade Development Company, their agents, accepting an offer of five hundred dollars, an offer for five hundred forty one thousand pounds of materials at Los Angeles?

A. I did, sir.

Q. Will you explain to the court how you happened to see that letter?

A. Mr. Robbins sent that letter over to me together with another letter dated March 13, 1946, for Mr. Johnson, and he explained to me that Mr. Johnson had purchased on behalf of the Associated Aluminum Metals approximately five hundred forty one thousand pounds of aluminum from the catalog. Catalog C-131.

Q. I don't believe I would go into what he explained, but did he want you to do something about it?

A. Yes, and he handed me a letter, a mimeographed letter from War Assets in Los Angeles accepting his offer to purchase the aluminum.

Q. I'll hand you defendant's exhibit number 8, and ask you whether or not the mimeographed letter was the same form as the letter in defendant's exhibit number 8?

A. It was the identical form.

Q. Now where--what did you do with that letter, Mr. Cohen?

A. I immediately telephoned an attorney in Los Angeles, and asked--inquired of him whether he would be in a position to represent Mr. Robbins, and his associates, in this matter.

Q. What was his name?

A. Morris Levine.

Q. All right, go ahead.

A. And he replied in the affirmative, and I sent the letter to him, together with a copy of Mr. Johnson's letter, and a letter of transmittal, outlining the facts in the case as I saw it.

Q. Have you ever been able to get that letter back from Mr. Levine?

A. No, I have not.

Q. Have you tried to do so?

A. I have written him, and also talked with him on the telephone.

Q. What did he tell you in regard to it?

A. He said for some reason—

MR. READ: I don't believe that would be admissible, what he told him, Your Honor, unless Mr. Levine is here.

THE COURT: It wouldn't prove the loss of the letter. It would be his explanation. I'll let him state what was told him, but it is not proof, it is hearsay, so far as proving this letter was lost, I think it is hearsay, because this man is available as a witness, by deposition or otherwise. You may state what he said to you.

A. He said he had misplaced that letter together with the entire file, he had moved his offices from the place where he had first been when I contacted him, and he could not locate it.

Q. Let me ask you this: Did he remember that specific letter?

A. He said he read the file.

MR. READ: I don't believe that would be admissible either, Your Honor.

THE COURT: I am not giving it any probative value, perhaps it is inadmissible, I'll let it in for the time being.

Q. Have you ever been able to get the letter back?

A. I have not been able to get the letter back, after I mailed it to him.

MR. ROBERTS: He is with you, Mr. Read.

CROSS EXAMINATION

BY MR. READ:

Q. All right, sir, Mr. Cohen, do you remember the date of that mimeographed letter?

A. It was dated approximately, between February 22nd and March 1st, could have been any date after February 22nd up to March 1st.

Q. Do you remember to whom it was addressed?

A. It was addressed to Associated Aluminum and Metals Company, or Johnson Trade Development, I don't recall.

Q. Johnson Trade Development in Los Angeles?

A. I think San Diego, wherever his office was, I don't think Johnson Trade Development was in Los Angeles, I'm not too positive about that.

Q. Will you look at Defendant's Exhibit 8, one of the letters you were talking about? Where is that addressed?

A. Addressed to Associated Metals, Los Angeles, 111 West 7th Street, Los Angeles.

Q. Did Associated Metals have an office there at 111 West 7th Street, Los Angeles?

A. I don't know.

Q. Look at this second letter addressed to Johnson Trade Development Company, 111 West 7th Street, Los Angeles, California.

A. Yes, sir.

Q. Would you say that Mr. Johnson's address in Los Angeles was 111 West 7th Street?

A. I don't know whether it was his address or not. I don't know.

Q. You just don't know?

A. I have never been to Mr. Johnson's address in Los Angeles. I just don't know.

Q. You don't remember to whom the mimeographed letter was addressed?

A. No, it could have been addressed to Aluminum Metals or Johnson, but it was relating to five hundred forty one thousand pounds of aluminum.

Q. Now there is a place in this letter, now, let's see, "number blank, which you submitted to us on blank", do you remember the date that was in there?

A. February 22nd, '46.

Q. You definitely remember that?

A. I remember the date.

Q. The date that was in there?

A. Definitely.

Q. Then what was in the space where—here on this first letter, of Defendant's exhibit number 8, giving a description?

A. The description in this space was the amount of aluminum, approximately five hundred forty one thousand pounds, C-131.

Q. Did it list all of those various serial numbers that are listed in that letter of February 22nd, of Johnson Trade Development Company?

A. I don't recall that it did. I think it had reference to the catalog number and the approximate poundage.

Q. If you remember, there were several catalog numbers listed there in Mr. Johnson's letter of February 22nd, that we have been talking about. You don't remember whether or not all those were listed there?

A. I don't remember whether they all were listed or not, no, but I did know it had reference to the five hundred forty one thousand pounds of aluminum that was purchased by the Associated Aluminum on that specific date.

Q. Was there just the one sheet, just the mimeographed letter, that was all you are talking about that you got?

A. Yes, that's all I am talking about.

Q. Now, in the mimeographed part here it says, "at your earliest convenience, please forward payment in

the amount of blank to cover your purchase." Do you remember the amount that was in there?

A. I don't remember the amount of dollars, no. I was interested in the amount of poundage to see if it would confirm with the catalog number. The reason I remember that, I had to value it, whether or not Robbins had a case against the Government for failure to deliver, and I was interested in the amount of poundage, five hundred forty one thousand, and the catalog number, the C-131. Now, as to the amount of money, I was interested in whether or not, to add that up and see what it amounted to.

Q. All right, to have an adequate description of that property, shown in Mr. Johnson's February 22nd, 1946, letter, do you think that such a description would go in this blank space here?

A: Well, no, not according to all those numbers, it wouldn't.

Q. You don't think an adequate description of that property could have been given?

A. Those numbers in Johnson's description certainly couldn't fit in a little space in that letter because they took up several pages.

Q. All right, sir, that is all.

MR. ROBERTS: You can come down, Mr. Cohen.

(Whereupon the witness was excused from the stand.)

MR. ROBERT ROBBINS: Resumes the Stand for continued

RE-DIRECT EXAMINATION

BY MR. ROBERTS:

Q. This is Detroit, it is paragraph 11. I believe that's right. All right, Mr. Robbins, you take that file—Mr. Clerk, I have several photostatic copies of the same document, 146571, here.

THE CLERK: Plaintiff's Exhibit Number 20, is photostatic copy of sales agreement, number 146571, dated 4-27-46.

(Plf. Ex. #20 marked for identification)

Q. Could you look here at Plaintiff's Exhibit number 20, Mr. Robbins, now it has a sales document number 146571, you also see over here in one of the blocked spaces, says Detroit 12900. Would you look there in your copy of the invoices or documents that you have and see whether or not that particular document is shown?

A. This one?

Q. Yes. That is one of the documents on which you are making claim, is it not?

A. Yes, we are making a claim for a part of that document. This is the copy of an invoice here which I assume was shipped. The claim is made for that part which was not shipped. The claim is made—I think I saw something relating to that while ago.

Q. Do you have one of these documents here that has that number on it, 12900?

A. Yes, here it is.

Q. Now does that appear to be the same or does that

appear to be different from this photostat here, plaintiff's exhibit number 20?

A. This appears to be the same as that.

Q. They are not exactly the same document though, would you say? That is not the photostatic copy of that same document there on number 12900?

A. No.

Q. Now, do you know whether or not you ever got any such document as plaintiff's exhibit number 20, anything like that at all?

A. Well, I would have to look it up.

Q. You can see there, the photostat, we don't have the back of it, terms and conditions, it apparently has some eleven conditions there. Apparently those terms or conditions of sale that are on some of these other documents.

A. Well, this says, this is a buyer's copy, but evidently it wasn't, because I assumed that—do we have this? I don't know.

MR. READ: Your Honor, I might say some of the copies we have, I don't know where they came from, whether Mr. Roberts gave it to Mr. Stephens when he was handling it, or whether it came from some place in Detroit.

MR. ROBERTS: It is possible I have it. I'll be glad to try and check to see, Your Honor. I just don't know, frankly.

THE CLERK: Plaintiff's Exhibit for identifica-

tion numer 19, is sales agreement, Detroit, Number 466661.

(Plf. Ex. #19 marked for identification only.)

THE CLERK: Plaintiff's Exhibit for identification number 20, Sales agreement, 146571.

(Plf. Ex. #20 marked for identification only.)

THE CLERK: Plaintiff's Exhibit for identification Number 21, is sales agreement, Detroit, number 146666.

(Plf. Ex. #21 marked for identification only.)

THE CLERK: Plaintiff's Exhibit for identification Number 22, sales agreement, Detroit, Number 146667.

(Plf. Ex. #22 marked for identification only.)

THE CLERK: Plaintiff's Exhibit for identification Number 23, invoice number 146670, Detroit.

(Plf. Ex. #23 marked for identification only.)

THE CLERK: Plaintiff's Exhibit Number 24, sales agreement, Detroit. Number 146809.

(Plf. Ex. #24 marked for identification only.)

THE CLERK: Plaintiff's Exhibit Number 25, buyers invoice, 2250170, Detroit.

(Plf. Ex. #25 marked for identification only.)

THE CLERK: Plaintiff's Exhibit Number 26, sales document, number 2262349.

(Plf. Ex. #26 marked for identification only.)

THE CLERK: Plaintiff's Exhibit Number 27, sales document, number 2262350, Detroit.

(Plf. Ex. #27 marked for identification only.)

THE CLERK: Plaintiff's Exhibit Number 28, sales document, 266497, Detroit. Correction, 2666097.

(Plf. Ex. #28 marked for identification only.)

CROSS EXAMINATION

BY MR. READ:

Q. All right, sir, will you look here at Plaintiff's Exhibit number 19, please, Mr. Robbins, sales document number, over here, 146661, and you see over here in the block, Detroit, 12846, is that number 12846 one of the numbers you are making claim there from Detroit, 12846?

MR. ROBERTS: Mr. Robbins, will you tell the stenographer what exhibit you are looking at there now?

A. I am looking at Defendant's Exhibit number 9.

Q. Is that the last sheet there in Defendant's Exhibit number 9?

A. Yes.

Q. Now does that have the same property as shown in your sheet there, defendant's number 9?

A. Well, it is not identical, it has some items, the documents that I have show three items, and the number that you refer to in plaintiff's exhibit number 19 has one item deleted, or remaining two items on it.

Q. Now, here on your copy, in defendant's number 9, marked through, deleted, and this one item in it here in plaintiff's number 19, is it not?

A. That is correct.

Q. Do you remember whether or not you have any such document or copy as plaintiff's number 19?

A. Well, I think this is our document here, isn't it?

Q. Well, I'm asking you whether or not you have yours, anything like number 19, plaintiff's number 19?

A. Well, this is something like plaintiff's 19 that we have.

Q. Is that the only document that you have on sale number 12846?

A. To my knowledge, yes.

Q. You also notice here in paragraph number 19, plaintiff's number 19, there appears on the other side some terms and conditions apparently the same as in plaintiff's number 20 that we have just talked about?

A. Yes, I do, but I don't acknowledge it is a copy of ours, that's what we were complaining about before. Some times they have these conditions on the back. Now, this is reproduced from the back, and there was another

one I just noticed while ago that had a hand stamp conditions that were unlike these. Now, the conditions, I think you will check and find were found on invoices that were made up after the material had been shipped for us and paid for or charged to our account.

Q. All right, on these—

A. If you will let me go a little bit further, you will notice on the copy we have on the same item you are talking about there are no terms or conditions.

Q. All right. You then must have gotten more than one document on each shipment, did you not?

A. I don't know.

MR. ROBERTS: I am sure Mr. Robbins, doesn't know but if Mr. Read will give me a list of those, I will do my best to find them overnight. If we do have them, because I have got all the files at my office.

MR. READ: All right. Well, I believe the situation is the same, Your Honor, on all of these, the rest of plaintiff's exhibits here, number 21 through 28, that Mr. Beers here has just identified. I don't know whether you, is there any use of us going into each one. I expect it would be the same. We wouldn't know whether he had such a document, with such terms, and it might be Mr. Roberts can find all of them in his file.

MR. ROBERTS: If I have got the original of those, and I have an idea I have, because they look like something I furnished Mr. Stephens before this

case ever got to pretrial even. I'll be glad to bring them in the morning, if I have got them.

THE COURT: I don't know what you are asking me, Mr. Read, I don't see any thing I can do except just to take the matter as you gentlemen put it in. I was hoping all these papers would be straightened out before we resume this hearing. It seems to be still quite a bit of uncertainty. I can't do a thing in the world except decide the case on the basis of what is put in evidence.

MR. READ: Yes, sir. What I was getting at, Your Honor, I believe all the invoices or papers here are defendant's number, comprise defendant's exhibit number 9. None of those have anything on the back, any conditions of sale. Now, it is our contention, and it has been all along, each one of these sales were governed by certain terms and conditions, and on some of the documents connected, in connection with each sale there was stamped, printed on the back, these terms and conditions of sale. On all of these that I have identified here, plaintiff's number 19 through 28.

THE COURT: Well, it looks like if the defendant puts in evidence documents which represent the contract between the defendant and War Assets, that either the conditions are on there, or they are not on there.

MR. READ: Well, it is our contention that is not all that represents the contract. We contend—

THE COURT: Well, then, it is incumbent on you to take some step to get the others.

A. Well, Mr. Read—may I interrupt a moment, Mr. Read, would it possibly expedite the matter, if on these documents that you have, which are invoices which were made up after the shipments that—we'll agree they show through, so we will agree that they are on there. The only question is they were made up after the material had been shipped. We don't, I don't see any necessity of having Mr. Roberts or any one else look up the original. We will agree it is on there, except we want it understood the documents were made up, and—after the contractual agreement had been reached, and after the material had been shipped to us. That will probably show on the document about that.

Q. Now, do you want to agree, Mr. Robbins, on each one of these transactions in Detroit there were documents that had these terms and conditions of sale on them?

A. Not on the transactions, but on the back of the invoices such as you have there. These are invoices that were made up after the material was shipped.

Q. All right. Well, regardless of when they were made up they will show the date on them, when they were made up. I am trying to find out whether or not you did have any other documents than the ones shown there in defendant's exhibit number 9.

A. We, what we have are similar documents that were made up before those were, evidently before the material was shipped; that doesn't say anything, doesn't show anything on it, on the back of them. These are the documents we got from War Assets, regarding the same

transactions, those transactions were made up, they are changes from these original because they were found with variations, and so forth, so I think we possibly can save some time by agreeing they are on there, the printed matter you referred to.

Q. Of course the dates on these I believe will speak for themselves.

A. Well, I glanced at a new—

Q. Regardless of the dates that were on the documents, this had to do with these—

THE COURT: Gentlemen, I think we will recess this case until tomorrow at 11 o'clock.

(Whereupon court adjourned.)

FRIDAY MORNING
May 7, 1954

(The case was called for hearing at 11 o'clock, and the following proceedings were had.)

MR. ROBERT ROBBINS: Resumes the Stand for Continued

RE-CROSS EXAMINATION

BY MR. ROBERTS: If the Court please, I think we were on Detroit yesterday and had some of these so-called sales agreements which I was going to try to find the originals of.

THE COURT: All right, sir.

MR. ROBERTS: I was not able to find those originals, but we are willing to admit on the back of these, Mr. Read has photostats which don't show the back of them, but we are willing to admit that they have those conditions of sale on the back of them.

THE COURT: Well, let the record show that stipulation covers the back of these—covers certain exhibits, and give the reporter the number of the exhibits.

MR. READ: On the back of Plaintiff's Exhibit 19, that there are on the back of the conditions of sale such as—

THE COURT: I believe that exhibit 8 maybe contains those conditions, I'm not sure.

(Plf. Exhibits 18 through 28 received in evidence.)

MR. READ: I believe on the back of one of the documents, Plaintiff's Exhibit 5, we have some of these conditions, Your Honor.

THE COURT: All right.

MR. ROBERTS: That is correct.

MR. READ: On all of these Detroit transactions.

BY MR. READ:

Q. Mr. Robbins, did you make claim to the Administrator of the War Assets Administration for the amounts that you considered you had lost for the none-delivery of these various pieces of property?

A. On the Detroit transactions in which they defaulted in shipment, we made claim.

Q. Now, here in Defendant's Exhibit number 22, I believe there were 14 claims there that you filed there, does that cover all the transactions you are claiming in Detroit?

A. Mr. Read, from these I can't determine whether they are all Detroit or not. I don't--they don't designate it as such, which would have to have a cross reference.

Q. Will you look at your tabulation, Defendant's Exhibit 1, and tell whether they are the claims on those particular transactions or not?

A. Yes.

Q. Were they all denied by the War Assets Administration?

A. Yes.

Q. Now, do you not have a running account with the War Assets Administration in Detroit?

A. Do you mean credit account?

Q. Yes, sir.

A. We had in Atlanta, but purchases from Detroit and other agencies were handled on a, on that basis.

Q. Did you have some one in Detroit handling the purchases up there for you?

A. At, we had some one, I don't know if it was all the time, but we had some one who did handle purchases for us that spent some time in Detroit.

THE CLERK: Plaintiff's Exhibit for identification number 29, photostatic copy of a letter, two pages, dated August 20, 1947, from Associated Aluminum and Metal Company, addressed to War Assets Administration in Detroit.

(Plf. Ex. #29 marked for identification and received in evidence.)

THE COURT: What is the exhibit he has just numbered?

MR. READ: Number 29.

THE COURT: Plaintiff's 29?

MR. READ: Yes, sir.

Q. Look at Plaintiff's exhibit 29, apparently which you wrote to War Assets Administration, Detroit, August 2, do you remember that, Mr. Robbins? Could you identify that?

A. Yes.

Q. All right.

THE CLERK: Plaintiff's Exhibit 30, letter dated

November 13, 1947 from Defendant to War Assets Administration, Detroit.

(Plf. Ex. #30, marked for identification and received in evidence.)

Q. Do you remember writing that letter to the War Assets in Detroit, November 13, 1947?

A. Yes.

Q. Now, did you pay up to the War Assets finally all of the amount that you were indebted to the War Assets in Detroit?

A. Well, as I recall, all the payments were made to Atlanta. Now, will you please restate your question again?

Q. You talked about the indebtedness here, apparently on all the transactions—

A. This is referring to the Detroit account?

Q. Yes.

A. But as I recall, we had an open account with the Atlanta Branch and each regional office cleared credit through Atlanta; as an example we had a hundred thousand dollars of credit; if Detroit, if we had purchased forty thousand dollars from Detroit, and say forty thousand dollars from another branch, that would only leave twenty thousand dollars at Atlanta, that we had on tab, that would only leave twenty thousand dollars open for some other office if we wanted to purchase. Anything over that we had to pay cash for.

Q. All right, sir. Here in the first sentence of this

letter, Plaintiff's Exhibit number 30, it says "Our records show an indebtedness to you of twenty seven thousand and three hundred twenty three dollars and twenty one cents." Do you know whether or not you ever paid that to the War Assets Administration anywhere or not?

A. No, we didn't.

Q. You never did pay that?

A. No.

Q. You did acknowledge at that time that you did have such indebtedness, did you not?

A. We did then, and still do.

THE COURT: What is that exhibit number?

MR. READ: Number 30.

Q. You still do acknowledge this indebtedness from Detroit, Mr. Robbins?

A. No, I don't. I think that is, I think that letter is misleading in that it seems to signify the indebtedness to Detroit, but I think it is to Atlanta, I could be incorrect but it is to War Assets and I recall it was approximately twenty seven thousand dollars.

Q. Now, Mr. Robbins, when you made claim to the War Assets Administration on these various short transactions, these Detroit transactions, and they were turned down, did you consider that terminated any right that you might have for that property?

A. No, I don't think so. I think that is the basis of this suit.

Q. Now, did you know anything else that you could have done after you made the claim and—the claims—and they were turned down?

A. Well, as they were turned down, we gave them to our attorney.

Q. Well, now, you knew that these conditions of sale that we have discussed did govern all sales of surplus property, did you not?

A. Are you talking about the conditions of sale on the back of the invoices?

Q. Yes, sir.

A. No, sir.

Q. Now, how did you know to make a claim to the Administrator?

A. Well, I don't recall the exact manner in which we determined it, but I assume that we asked some one at War Assets.

Q. Did you consider that you had any other remedy at all after the claims were all denied?

A. Yes.

Q. What did you consider that was?

A. Well, I left that up to our attorneys.

Q. All right, sir. Were there not brochures, or offerings, printed brochures or offerings on all of these sales in Detroit?

A. I think there were.

Q. Do you know, do you have any of those brochures with you?

A. No, sir.

Q. Do you have any of those—

A. I don't know if Mr. Roberts has or not.

Q. Do you remember whether on any of those brochures or offerings there were any conditions of sale printed.

A. Well, you have one there, if you will let me look at it. You have one.

Q. All right.

A. If you will look at Plaintiff's Exhibit Number 2, that is an offering, a special listing, as here, we are talking about, this was done, we are talking about Detroit, this for sealed bid has nothing to do with what we are talking about.

Q. What I'm asking you, on the Detroit brochure or offerings, there was any such condition of sale.

A. I don't think so. We looked over some yesterday and we didn't find them.

Q. So you do have some available.

A. No, we looked—

Q. I'm talking about the brochures, or offers.

A. Well, that would be in the record, if you will let me see them, I'll be glad to answer the question.

THE COURT: What is the exhibit number of that brochure?

A. This is exhibit number 21, but it isn't applicable. This only has invoices on it.

Q. Plaintiff's Exhibit number 21, Your Honor, was the one I was questioning him about, as to whether or not—

THE COURT: Does this apply to Detroit?

MR. READ: That's what I was questioning him about.

A. That applies to Boston.

MR. READ: Oh, this one here applies to Boston, yes, sir.

THE COURT: Do you have the brochure which is applicable to Detroit?

MR. ROBERTS: We don't, Your Honor.

MR. READ: I don't have it here, do you, Mr. Robbins?

A. No, sir. We have one there, that is similar, from Los Angeles. Now this is a sealed bid, that is altogether different from what you have here. We have that C-131 from Los Angeles, a similar type brochure, this type of brochure was offered.

Q. You wouldn't know unless you looked at this particular offering or brochure just what conditions it had in it, would you?

A. No.

BY THE COURT:

Q. Did each office get out a separate brochure?

A. Yes, they made up, there are some different ones here, he had one from Boston that is not at all similar to the one in Los Angeles. We had one presented from Philadelphia, they are all different. Evidently they made them up and continued to change them. As I recall, they didn't follow a set pattern.

BY MR. REA:

Q. Well, now, if on the brochure offering on the Detroit property, there were such conditions of sale as apparently are in this brochure here, plaintiff's exhibit number 2, you would consider that those were governing the sale, would you not?

A. Yes.

Q. All right, sir. Have you ever filed a claim with the General Accounting Office on any of these transactions, Detroit, California, Atlanta, Louisville, or St. Louis, Mr. Robbins.

A. We filed the claim, I don't know which office it was filed with.

Q. Do you have here in evidence all the claims that you did file?

A. Yes.

Q. Then, did you not make any such claim to the General Accounting office, or did you?

A. I don't understand, I don't recall which office it was they were filed with, but I understand it was with the office in War Assets that accepted claims.

Q. Yes, we have been talking about various claims here, those are apparently to the War Assets Adminis-

tration, and those are the only ones that you were, made on any of these transactions, aren't they?

A. I assume so.

Q. I think that will cover—I am through with the Detroit transactions at this time, Your Honor.

THE COURT: All right.

Q. Mr. Robbins in regard to the St. Louis transaction, your defendant's exhibit number 20, is the decision on the claim that, on the claim that you filed on the St. Louis transaction, is it not?

A. Yes.

Q. Is there just one transaction in St. Louis, or were there more? Did you look here?

A. I don't recall, I would have to look at the file.

Q. Would you look here at Defendant's Exhibit number 5, and see whether this is just one or not?

A. This says for four claims.

Q. Totaling fifteen hundred thirty four dollars, sixty three cents.

A. That's right.

Q. Is that the amount of your counter-claim from the St. Louis office?

A. Yes.

Q. Do you have any of the other sales documents regarding these transactions?

A. I don't know if we do or not. Yes, Defendant's Exhibit number 19.

Q. That is one of the sales documents?

A. That is a confirmation of, this is a letter from War Assets to us, stating that this material had been, is being held for us, that it had been sold to us.

Q. All right, sir. Do you have any of the actual sales documents, such as—

A. Well, I don't think we have that because the material was not delivered. That was made up after.

Q. Never received any material at all from St. Louis?

A. We bought material from St. Louis, but we are talking specifically about this material they didn't ship, aren't we?

Q. You say this was material that was not shipped. Are these papers that you have here, Defendant's Exhibit number 19, Defendant's number 5, and defendant's number 20, are they all the papers that you have here with regard to the claim on the St. Louis transaction?

THE COURT: Mr. Read, maybe Mr. Roberts here could answer that question better than the witness. Mr. Roberts, could you point out, would you point out, please, sir, which documents show—

MR. ROBERTS: The only thing we have on St. Louis, if Your Honor please, is Mr. Robbins' testimony that he bid on this property described in Defendant's Exhibit number 19, and that Defendant's Exhibit Number 19 is the only, is the letter which accepted that bid, is our position on it, and that they later just refused to ship it.

THE COURT: Now what evidence is the bid?

MR. ROBERTS: We don't have it because it was sent to War Assets and we don't have it?

THE COURT: You have no bid?

MR. ROBERTS: But Mr. Robbins testified to, on direct, that he made a bid on this material.

A. This letter states, this is a letter from War Assets, St. Louis, to us, stating "reference is made to your letter dated April 15, and 17th; in accordance with your request there follows an outline of materials held for your account." This refers to evidently bids that we had made, but we have not been able to find copies of them.

Q. Do you have the brochure of offering on it on your St. Louis claim?

A. No, we don't. A lot of this stuff, we had dealers throughout the country, and people that we had dealt with, that would tell us a certain material we had advertised in the American Metal Market for material we had to sell as well as material we needed for accounts, and occasionally some one may call us up and say, a certain agent has this material and we would either write them or call them, and tell them what we needed. There was a standard price, it wasn't a matter of pricing, it was whether the material was available to be sold, and if so, they would just tell us, it is our material, so we didn't necessarily have those pamphlets that you saw in the early stages of selling of this surplus aluminum.

Q. There was some kind of offering or brochures on that property though, was there not?

A. I don't know. I don't have a record of it. This letter doesn't refer, their letter, it refers to some initials

here, I don't know whether, it doesn't seem to look like the offering from the other agencies.

Q. You say you did actually get shipped to you some of the property that you had purchased in St. Louis?

A. Oh, yes. I don't know whether it was from this material, but I say we bought material from St. Louis.

Q. Do you have any of those documents on those transactions?

A. Well, the only documents we have I think that will substantiate our claim are not, we had files and files of paid invoices, but we don't have them here.

Q. On the other transactions that you actually did get delivery on, do you remember whether or not there was a written offering or brochure?

A. No, I don't. I attempted to explain that. We didn't necessarily get brochures, that we found out an office had something to sell that we needed, we would call them up.

Q. Did you not know that the War Assets Administration reserved the right at any time up to delivery to withdraw any offering that had been made, Mr. Robbins?

A. I understood that they had that right, if the material were called in by some of the Governmental agencies, like the Armed Service. I understood they had some such right.

Q. What is your understanding of the reason you did not get this property you are talking about from Louisville? I mean St. Louis?

A. Well, I don't know if they gave us an excuse. I could check it of course and see. They just— As far as

I know they just didn't ship it. You are asking about General Service Administrator, these letters are addressed to the General Service Administration.

Q. Yes. General Service Administration was successor to the War Assets Administration, was it not?

A. I don't know. Well, we don't seem to have any reasons from them for cancelling the sale.

Q. You don't know whether they had it available then or not, do you?

A. We only had their letter stating it was available, and they were holding it for us. We never saw the material.

Q. Do you know whether or not this property you are claiming for here is part of an offering you may actually have got delivery on?

A. No, I don't.

Q. You think it might have been?

A. I have no idea.

Q. All right.

BY THE COURT:

Q. You say the material was not delivered. Do you mean, under your Defendant's Exhibit 19, there, where they sent you a paper which you say was accepting your bid, did they later ever deliver you anything from the St. Louis office?

A. I, we delivered—we purchased quite a bit of material from the St. Louis office as well as the others.

Q. That was later on?

A. Well, before and after. Now whether it was a part of this same material, I would have to check and see, because we have it in the file there, we have a list of the material that they did not ship. Now, I don't know whether Mr. Read—may I see that I again—please—

Q. Maybe these are questions again that Mr. Roberts might be able to answer. I have got to go by these invoices.

MR. ROBERTS: If any of this was shipped, it was shipped on some subsequent offering, which would be impossible to tell, if the Court please, whether it was part of this or not.

THE COURT: Well—

MR. READ: I believe if we had the actual offering or brochure and some of the documents that would have the same numbers that were offered in the brochure. We probably would be able—

MR. ROBERTS: Of course, as far as I can tell, there wasn't any of them in the brochures.

A. This lot doesn't refer to a brochure at all in their correspondence. You can check their correspondence where they had a brochure, and they show it on the letter. This letter doesn't designate any brochure and we wouldn't necessarily have it anyway, because we did all of our business, I mean we were selling by telephone, and we were constantly, our phone bills would run around six or eight hundred dollars a month, because that was stricly a telephone business.

THE COURT: Gentlemen, I am going to have to recess for a while. I just want to make a sug-

gestion, that in questioning this witness, his answers almost uniformly come back to documents.

MR. READ: Yes, sir.

THE COURT: And it would seem to me that if the documents on each of these transactions, they could be a synopsis of them written out, that they would really show for themselves. I just don't know that we are making much progress when we ask questions, and the witness has to rely on documents, and the documents themselves in some instances will show, and in other instances will not show. Now when you say this, that as to St. Louis, there was some orders before the order complained of, there were some orders after that, there were some deliveries, we don't know which they are on. Now, all that is rather nebulous, it doesn't mean a thing in the world to me.

MR. ROBERTS: We have direct testimony—

THE COURT: If you have any documents, if you have it in documents, all this testimony is meaningless.

A. I think now this will answer the question much better. There were one or two—

THE COURT: Gentlemen, I am going to recess now, and if you can get that together, clarify that, it is all right. I will recess until 2 o'clock.

(Whereupon recess was called for lunch.)

AFTER LUNCH

THE COURT: All right, you may proceed.

MR. READ: Your Honor, at this time I would like to make a motion. I think ordinarily it might come at the end of defendant's evidence, but we had testimony that no claim had been made to the General Accounting Office on any of these claims for credits or counter-claims made by the defendant, and on the basis of the Statute, 28 U. S. Code, Section 2406, which provides that in an action by the United States against the individual evidence supporting the defendant's claim for a credit shall not be admitted unless he first proves that such claim has been disallowed, in whole or in part, by the General Accounting Office, or that he has, at the time of the trial, obtained possession of vouchers not previously procurable and has been prevented from presenting such claim to the General Accounting Office by absence from the United States or unavoidable accident." I think it has been shown affirmatively that no claim has been made with the General Accounting Office, and none has been denied, and I want to move to dismiss the defendant's counterclaim.

THE COURT: What code section is that?

MR. READ: 28, United States Code, Section 2406.

THE COURT: I will reserve ruling on that. It comes so late, we are mighty near finished trying the case, Mr. Read.

MR. READ: I might state this, Your Honor, there are a number of decisions which also provide from

claims filed with the proper administrative agency you don't have to comply with that code section. I don't have them available, but I can give them to Your Honor. I mean I don't have them here in the court room, but you don't have to file with the General Accounting office if you go through the general procedure with the Administrative Agency.

THE COURT: All right.

A. Mr. Roberts, I just read a letter from Mr. Moody.

MR. ROBERTS: That is not the General Accounting. No claim was ever filed with General Accounting.

Q. Mr. Robbins, I believe you were testifying here about these St. Louis transactions, that you wanted to continue on what you were saying there.

A. Well, just before we adjourned, the court had asked about this; these claims in St. Louis, and we have this letter dated, this is Defendant's Exhibit number 19, that was written by the St. Louis Agency to us, stating that eight lots of material have been held for us, and four of these lots were delivered to us, and they failed to deliver four of which we filed claims against.

Q. I think that is about all on the St. Louis transaction then. Now, we come to the St. Louis—the Louisville transactions, that is paragraph 14 of the counterclaim. Do you claim three hundred fifteen dollars, fifty cents on the Louisville transaction, Mr. Robbins? Look at Defendant's Number 18. That is the copy of the decision on the other claim that you filed.

A. One hundred forty four here. No, oh, no, I'm sorry.

Q. How much were you claiming on that? Look at Defendant's 17, that is a copy of your claim, is it not?

A. That's right, that is correct.

Q. All right. Well, now here, about these same transactions, look here at Defendant's Exhibit number 15, that is invoice number 346390.

A. Yes.

Q. You see on there that, through that photostat, apparently some sales conditions. Do you know whether those were the same sales conditions we have seen in some of these other papers?

A. No, I wouldn't.

Q. Do you have the back part, do you have the original of that?

A. I think I saw it over in one of those files. Well, we had been allotted two items and they shipped this item, and not the other. Oh, this is what I saw.

Q. That is Defendant's number 16.

A. You see, this is where we were allotted the items here. Wait a minute—

Q. Do you have the original of Defendant's Exhibit Number 15, that invoice that apparently has some conditions of sale, terms and conditions on the back.

MR. ROBERTS: We will make the same stipulation in regard to that, if Your Honor please, that Defendant's Exhibit 15 had the standard conditions

of sale on the back of it. I don't know where the original is, but I am sure it did.

A. Mr. Roberts, I don't know whether this is in error, but this photostat says a credit memorandum.

MR. ROBERTS: That's what it is, it shows that you were allotted that much, this was shipped and that was not.

A. Yes. What is the date of that? That is two months later. Actually there should have been a claim filed on this too, issued a credit memo on this, we never received it, we only filed a claim on that. See the invoice is for the whole amount, then they didn't ship it.

(Conference between Mr. Roberts and the witness Robbins off the record.)

Q. Now, this invoice Exhibit number 16, is that the original invoice?

A. No, this appears to be the original credit memorandum, that is approximately two months later, dated two months later than this invoice. Now what happened was that, you see when they allotted us the material we sent them a check for nine hundred forty four dollars to cover both items, and they only shipped us one item, and—

Q. And you got, four hundred twenty six dollars and ninety two cents back, or gave the Government five hundred seventeen, 0-eight back?

A. No, we only got part of that item. Looks to me like, I'm just looking at this same thing here, it only shows a partial shipment of this four hundred—four

thousand pounds—Oh, I see—wait a minute now—we filed a claim for part they didn't ship. We paid them, they invoiced us, and we paid them for four thousand—that's right—we—they—we bought, and they invoiced us for four thousand pounds, and it was short-weighted. This amount right here, and that's what we filed claim on, the difference in the shortage.

Q. All right, sir, were there any other documents regarding this particular transaction that you have anywhere?

A. Not that I know of.

Q. Well, do you remember any kind of offering or brochure that the War Assets Administration put out on this particular property, on property of which this was a part?

A. No, I do not. Now here again, they don't refer to any offering number, whereas on some of the others they do. This I think was something that we possibly called their office to find out if they had, and they said they had it, and sold it to us.

Q. Do you know whether or not the War Assets Administration had other property available that you did not get?

A. No, I do not.

Q. Here in the—you look here in Defendant's Exhibit Number 18, here in this paragraph, Conclusion, would you look at that and see whether or not that might refresh your memory and as to whether or not they might have had it on hand at that time or not.

A. Well, this quotes law, they don't state whether they ever had it available or not.

Q. I just asked you if that refreshed your memory as to whether or not they made it available?

A. We had no way of knowing whether they ever had it.

Q. All right, sir. Now with regard to Paragraph 15 of your cross action, dealing with the Atlanta claim, do you have any offering or brochure that was put out at that time before you bought, before you made any bid for the property you claim here?

A. May I look in the file? No.

Q. How many transactions are there involved here in your Atlanta claim, Mr. Robbins?

A. I think we have them itemized, it might be simpler, I think this only involves one. We issued our check to a customer for a loss. I think this is where they have shipped us the wrong material that was delivered to our customer, and the boxes were incorrectly marked. After they opened it, they found the error.

Q. Just the one transaction involved there?

A. I think so. Is that correct, Mr. Roberts?

MR. ROBERTS: Yes.

Q. I think you should know, rather than your attorney, what you did at the time, Mr. Robbins.

A. Well, I'm sorry, but my memory is not so good for eight years, and I know it has been condensed.

Q. You made claim to the War Assets Administration?

A. Yes.

Q. For what you claim here?

A. That's right.

Q. Do you have the decision of the War Assets Administrator?

A. Here is a letter dated March 3, signed by—

Q. Is that part of Defendant's Exhibit Number 14?

A. Signed by W. W. Barrett, Assistant Chief, Claim Section, denying the claim we were referring to.

Q. That is a letter of which date now?

A. Next to the last one here, right here, March 3, 1947.

Q. You made a partial allowance of a hundred eighty seven dollars on a total claim of five hundred thirty one dollars, thirty six cents, did you not?

A. That is correct.

Q. What was the hundred eighty seven dollars, twenty four cents that you were allowed, what did that represent?

A. I would have to go back to the file. This is from the same exhibit number 14, a letter dated October 29, 1946, signed by H. M. Stephens, War Assets, it states that part of the claim dealing with the difference between the shortages and overage of aluminum in the amount of $187.26 has been considered as fair and reasonable. In other words, they allowed the claim on shortage of metal, but not on the loss incurred in their error, in making shipments.

Q. You shipped part of that to the E. G. Sheet Metal Company, yourself, didn't you?

A. We shipped it out there.

Q. You didn't open it before—

A. No, sir, they picked it up from this Treasury Department Warehouse. We didn't touch it.

Q. What does that handling charge of three hundred forty four dollars, twelve cents represent?

A. That was rebate, we made to our customer to cover their loss in the handling and opening and re-crating of all that material. We did not touch it. We issued a check to them for that amount.

Q. You never saw the property yourselves?

A. No, sir.

Q. Never opened it?

A. No, sir.

Q. Never did examine it before or after you purchased it, before it went in the hands of you—

A. Yes, after they opened it, and they found out, they phoned us and told us it wasn't material they needed, we went over and examined it then.

Q. You had already purchased it at that time?

A. Oh, yes, that was the only way we could get it.

Q. You didn't look at it before you purchased it?

A. We never look at anything, all these purchases were supposedly new crates from, this was surplus material, we never bought used aluminum sheets.

Q. All right, was there any way you could tell from looking at the outside of the boxes that they were erroneously labeled?

A. Well, this is the first and only instance I ever heard of, I—and we purchased hundreds of thousands of pounds of aluminum all over the country, and never had occasion to look at it before or after we purchased it.

Q. Well, how did you know that that was the, what made you think that was the property you thought you were getting?

A. Well, that's what the warehousemen at the War Assets Warehouse delivered as being the material we had purchased.

Q. Delivered it directly to your customer?

A. Yes, their truck picked it up, the E. G. Sheet Metal Company.

Q. Do you know yourself when they were first inspected by them?

A. No, sir, I don't, but it was within a day or two after delivery was made.

Q. Did you state whether or not these documents here, defendant's number 10, 13, and 14, are all the documents that you had, that you have, that had to do with this transaction?

A. Well, the credit memorandum that is referred to isn't here.

Q. How about your original bid for the property, do you have that, a copy?

A. Well, that was probably done by just a telephone call.

Q. You don't know? Do you know whether or not you made a written bid or not? You just think it was by telephone?

A. I don't know.

Q. You don't remember whether or not there was a written brochure or offering of any of that property?

A. No, sir, I don't.

Q. All right, sir.

THE COURT: Now it is stipulated that those conditions were on this—

MR. ROBERTS: That one I believe has the conditions on it.

THE COURT: On this too?

MR. READ: Has some conditions here, Your Honor, he testified he didn't know whether or not there was a written brochure or offering, so we don't know whether there was any conditions of sale on that. If there were one—

THE COURT: Your stipulation doesn't cover—

MR. READ: That was just—he stipulated on the Louisville transaction, I believe, that is on Defendant's Exhibit Number 15. You can see through on the back, that the regular conditions of sale govern there, that was on the Louisville—

MR. ROBERTS: On the Atlanta, if the Court

please, I wouldn't want to stipulate anything about it, because it has the terms of sale on the back of it; the document introduced in that case, so there is no point in stipulating what would be on it.

THE COURT: You say in Atlanta, there were conditions?

MR. ROBERTS: Yes, Defendant's Exhibit Number 10 has the sales conditions on it.

THE COURT: I see. All right, sir.

MR. READ: Of course we don't know whether there may have been any on the brochure or not. I believe that is all the examination of Mr. Robbins I have.

MR. ROBERTS: I have one other exhibit, if the Court please, I overlooked. It is the general denial by the Washington office of War Assets of all these claims,

THE CLERK: Paper dated February 23, 1950, marked Defendant's Exhibit Number 24.

(Deft. Ex. #24 marked for identification.)

RE-DIRECT EXAMINATION

BY MR. ROBERTS:

Q. Mr. Robbins, I'll hand you Defendant's Exhibit Number 24, and ask you if you received that from War Assets?

A. Yes, we did.

Q. I'll tender that, if the Court please. That is not applicable to any one paragraph, but to all of them. Do you have a copy of the letter or claim that you yourself wrote or made to the General Services Administration to receive that, Mr. Robbins?

A. I don't know if we have that or not. I assume that we do. This refers to our letter of February 15, 1950, requesting this office to give further consideration to several claims for loss of anticipated profits. I don't, I'm not certain, but I could check it and see.

Q. Well, if we had copies of your letter here, of course we could tell just what claims there were, you were referring to, couldn't we?

A. I think it would be much more specific, yes.

MR. READ: Without further explanation, without the other copies, Your Honor, I don't know what this Defendant's number 24 would illustrate. If we had them all together so we could see them, we would have no objection. I'm not sure just what that would illustrate.

A. I could testify this: these were the only claims that we had with War Assets, and that letter might be in reference to them, if that would expedite matters.

MR. ROBERTS: I have not found the letter this refers to. Could I look again? I still—I think it is admissible. It just says that all their claims—

THE COURT: Well, I'll admit it, if it is not connected up, I'll have to disregard it. There is evi-

dence those claims were made and they have already been put in evidence, I think.

(Deft. Ex. #24 received in evidence.)

MR. ROBERTS: The claim and the individual action on each claim has been, and this is just a general letter telling them that he had exhausted his administrative remedies insofar as the claims are concerned.

MR. READ: The letter referred to in this letter here, however, claims referred to in that letter have not been admitted in evidence, I don't believe.

THE COURT: Well, I will admit it.

Q. Mr. Robbins, Mr. Read asked you about Plaintiff's Exhibit Number 29, in which there was correspondence about an account at Detroit. That the account that is being sued on by the Government here at this time?

A. That is correct.

Q. That is also true of Plaintiff's Exhibit Number 30, about which he asked you, is it not?

A. This is a letter, our letter to them, acknowledging this debt.

Q. The debt is the same debt that is being sued on in this case?

A. That's right.

Q. So I don't believe I have anything else from Mr. Robbins, if Your Honor please. I don't have any other testimony except I do want at some stage to offer the

depositions with the opportunity to go over them. Otherwise, I have nothing further.

THE COURT: Well, the Government closed, didn't they?

MR. ROBERTS: I don't know whether they had anything in rebuttal.

THE COURT: Mr. Robbins is your witness, isn't he?

MR. ROBERTS: Yes, sir.

THE COURT: Well, you may go right on with your deposition.

MR. ROBERTS: Shall Mr. Read and I just read the questions and answers?

THE COURT: Yes.

MR. ROBERTS: This is the deposition of James McGee Johnson, and was taken on behalf of Defendant in Los Angeles on July 14, 1952. Miss Leila F. Bulgrin, Assistant United States Attorney, appearing for the plaintiff, and Mr. Cohen for the defendant.

(Mr. Roberts read the questions and Mr. Read read the answers.)

(Page 2) "Did your company have authority to make purchases of aluminum for or on behalf of Associated Metals Company at War Assets or any other place where it could be obtained?" "Answer: Yes."

MR. READ: Now, Your Honor, whether or not he had authority I think would be a conclusion, unless we have evidence. Do we have written evidence to that effect?

MR. ROBERTS: We have a letter in evidence which Mr. Robbins wrote War Assets Administration, telling them he had that authority.

MR. READ: All right, sir.

MR. ROBERTS: "Did you, during the course of your agency agreement with Associated Metals in Atlanta, Georgia, purchase a quantity of aluminum from War Assets Administration on February 22nd, 1946, at San Diego, California?"

MR. READ: The answer is "Yes". Your Honor, I think that would be a conclusion he had actually purchased.

MR. ROBERTS: I think that the deposition goes on and explains, he goes into details further along.

THE COURT: I'll leave it in.

MR. ROBERTS: If Your Honor please, I might give you this, if you would like to make notes on this original deposition I have another copy.

THE COURT: All right.

MR. ROBERTS: We are on page 3. "With whom at War Assets Administration did you make the arrangements to purchase the quantity of aluminum?" (Continues reading.) "I hand you a memorandum dated February 26, 1946, a copy of a memo-

randum dated February 26, 1946, marked 12:30 P. M. which purports to be a confirmation of a purchase of 541,745 pounds of aluminum from the War Assets Administration at San Diego, California, and I will ask you, did you prepare this memorandum?"

MR. READ: As to that, we have that here, Mr. Roberts.

MR. ROBERTS: I believe that is attached to the original, it is the same thing as—

MR. READ: It says a memorandum dated February 22nd, 1946, I mean February 26, 1946, and that is a typographical error; the one Mr. Roberts has here is February 22, 1946.

THE COURT: Does that refer to the Los Angeles transaction?

MR. ROBERTS: All of this is in reference to the Los Angeles transaction.

THE COURT: Yes. Now, is that Defendant's Exhibit 6, that is the order I think.

MR. ROBERTS: The stenographer apparently just misunderstood the date in there.

THE COURT: Does that refer to the acceptance of it?

MR. ROBERTS: That refers to this, if Your Honor please, which is a memorandum.

MR. READ: That is Defendant's Exhibit A.

THE COURT: That's right.

MR. READ: I believe it is probably just a typographical error then.

THE COURT: All right.

MR. ROBERTS: (Continues reading) "I will ask you, did you prepare this memorandum." Answer: "Yes, I did." (Continues to read.)

MR. ROBERTS: The answer to the question on line 13, page 5, is stricken.

"Did you instruct Mr. Follick of your office to contact Mr. Irwin at the San Diego office of the War Assets Administration." (Continues reading)

MR. READ: Your Honor, rather than for me to keep objecting when he says, "have you consummated a purchase," if Your Honor understands I object to that—

THE COURT: I sustain the objection to that. I think that is a conclusion that he consummated a sale.

MR. ROBERTS: I think so too. I think that is a conclusion. I still think the facts he states are material, but we wouldn't insist on the statement that he consummated a sale having any probative value.

THE COURT: All right.

MR. ROBERTS: The answer was, "Yes, immediately." "Question: Now were there any exceptions made to that subsequent to the date they informed you?" (Continues reading.) "Answer: There were no exceptions made, but on the morn-

ing of February 28th, Mr. Page of the Los Angeles War Assets office telephoned me personally at my Los Angeles office and asked me as a personal favor to relinquish to WAC office in Los Angeles a quantity of 12,000 pounds of Item No. 132378-2-13."

MR. READ: I believe I should object to that, Your Honor, talking about a conversation that the man called him without anything else. I don't believe that is admissible.

THE COURT: It doesn't do any harm, he asked him to relinquish and he said "Not immediately."

MR. ROBERTS: I think certainly anything that War Assets called our agent and told them would be admissible.

THE COURT: I'll leave it in. I am not stating what effect, if any, it had. I'll leave it in.

MR. ROBERTS: "Did you consent to relinquish this amount?" "Answer: Not immediately." (Continues reading.) "I can quote him verbatim." (Page 7, Line 12.)

MR. READ: We have the same objection to that.

THE COURT: Yes. I'll leave it in.

MR. ROBERTS: "He said, 'After all, we sold you over 500,000 pounds at San Diego, so you should not mind giving us back this 12,000 pounds, which will help us a great deal.' "

MR. READ: I object to that, too, that is in the same paragraph.

MR. ROBERTS: "Mrs. Bulgrin: For the record you are refreshing your memory from this letter written by you to the War Assets Corporation, 215, West Fifth Street, Los Angeles 13, California?" (Continues reading.)

"Answer: On the 12th of March, the day prior to the writing of this letter, I had occasion to visit the Los Angeles office of War Assets Administration on another matter, at which time Mr. Olson, seeing me on the floor of the office, walked up and told me he was very sorry, that he had been ordered to cancel our purchase of the material listed at San Diego." (Page 8, Line 25.)

MR. READ: I don't believe the last part would be admissible, about what he walked up and told him.

MR. ROBERTS: I think what Olson told him would be admissible, he was working for the Government.

MR. READ: That is all hearsay testimony, where he said somebody told him something. . .

MR. ROBERTS: I think he can testify to anything the Government agent told him at the time in regard to showing—

THE COURT: Now, this statement by Mr. Olson that he had been ordered to cancel it, I believe I'll sustain the objection to that. The question as to whether he answered it would be material, the question that somebody told him that, to cancel it, it seems to me to be hearsay. I don't know.

MR. READ: Yes, I believe it would be inadmissible.

THE COURT: It wouldn't have any probative value, it wouldn't prove cancellation, neither would it prove who directed the cancellation and if the cancellation was made, I don't know whether it is material, who directed Mr. Olson to do it.

MR. ROBERTS: Of course, Mr. Throckmorton testified here—

THE COURT: I'll leave it in, gentlemen. I am leaving all this testimony in, but when I go to make my findings of fact, I don't expect to make any findings of fact on any hearsay, and if counsel wish to go through all this evidence, make a motion to exclude any of it, and let me have an express ruling on it, I'll make it at the end of the trial. My experience has been, though, that hearsay never enters into an adjudication, and the courts have frequently said that hearsay, if admitted, there is no probative value, particularly in a non-jury case.

MR. ROBERTS: I won't insist on any hearsay, Your Honor. I don't think what Mr. Johnson testified, that is, that an agent with whom he was dealing on this purchase in San Francisco could be hearsay. Of course, I agree that he told him somebody else ordered him, that part where he said somebody else ordered him to cancel, I think would be hearsay, but I mean I don't think just—

THE COURT: Well, it doesn't prove that somebody ordered him to do it.

MR. ROBERTS: Well, it wasn't offered for that purpose, Your Honor, of proving by Mr. Olson that a sale had been made.

THE COURT: Well, I'll leave it in.

MR. ROBERTS: That Mr. Olson, who was the head man in Los Angeles office at that time, considered that a sale had been made to the defendant.

THE COURT: All right, sir, let's go along.

MR. ROBERTS: "The Witness: I was, of course, amazed and incensed." (Continues to read on page 9) "Answer: I haven't to this date been able to locate it." (Line 26).

MR. READ: We move to strike all reference to that, since he didn't have it there. He says he wasn't able to locate it.

THE COURT: Does he state the contents of the letter?

MR. ROBERTS: He had a copy, and I believe a copy was introduced and attached to the deposition, but what he says he didn't have is the copy which was initialed by the War Assets Administration, and marked "True" by them.

MR. READ: Well, all that I did have objection to. He is talking about having initialed it, and that he kept the copy, and he did not produce the copy.

MR. ROBERTS: Well, he had a copy of it there at the hearing, and one of them is introduced. Of

course I don't insist on the copy which was initialed by them, because I don't think that would have any effect, one way or the other. The fact they initialed it. I think he can state he showed it to them, which he did, and then he goes on and says, "You are still attempting to find it," I presume. He says, "Since this date I have been in Europe, and I have moved to Riverside and back to Del Mar, and I packed lots of stuff in the barn at my home, and I have run across some of the documents involving this particular transaction, but I had no occasion—I still hope to locate it."

THE COURT: I will admit the testimony up to this point. This is not a tender of the letter, neither has he gone into the contents of the letter, merely the fact there was a letter.

MR. ROBERTS: "I state on oath." — "These gentlemen did initial each paragraph of that letter in which reference was made to them or statements made by them—by each of them" (Continues reading on page 10.)

MR. READ: Your Honor, on that part up there where he made the statement that after you were informed such and such, and the balance—(Page 11.)

MR. ROBERTS: That is just a question. I don't think it has any value at all, because it wasn't answered apparently.

THE COURT: All right.

MR. READ: All right, go ahead.

MR. ROBERTS: "Answer: I did indeed." "Question: Now will you please state in what manner and how you discussed the matter with him? And state to the best of your recollection the conversation you had." (Page 11, Line 20.)

MR. READ: I believe he can say he had a conversation. I don't believe that would be admissible.

THE COURT: He said he discussed it with Mr. Throckmorton.

MR. ROBERTS: Certainly any statement Mr. Throckmorton made to him in regard to the transaction would be admissible. "My conversation with Mr. Throckmorton was by telephone. It was occasioned by the fact that Mr. Olson and Mr. Page, both, verbally evidenced their embarrassment at having to act on an order from their superior, Mr. Throckmorton, to cancel a bona fide sale which had been partially delivered."

MR. READ: I move to strike that. I don't believe the last sentence would be admissible, Your Honor.

THE COURT: I am leaving all of it in, gentlemen. I can't pass on every sentence in a long deposition as we go along. I will take care of all of these objections when I make my findings, but I don't believe that we would ever finish this matter, if we—you may enter your objections, of course, Mr. Read, but I am going to take care of all of them when I make my findings.

MR. READ: Yes, sir.

MR. ROBERTS: "I wanted to talk to the man

personally responsible for the matter, which I did in Washington, in Mr. Olson's office." (Continues reading on page 12, line 6.) (Line 22—) "After considerable stammering and stuttering—"

If the Court please, I recognize there is a whole lot in here that is not admissible.

MR. READ: Yes, sir, I didn't want to object to every little thing that he came to.

MR. ROBERTS: "After considerable stammering and stuttering, and leaving the phone for a protracted period, he returned and said he was very sorry, but that it was true, that he had directed the Los Angeles office to sell this material to some one else." (Continues reading.) (Page 13, line 6.) "I told him as a trusted agent of Associated Metals, and as the head of a reputable American firm, I had no intention of permitting the planned repudiation of a bona fide contract on the part of my Government."

MR. READ: I don't believe that would have any bearing.

THE COURT: I am going to let it in, gentlemen.

MR. ROBERTS: (Continues to read.) "He was well aware I was incensed, that I was quite incensed, and in order to pacify me temporarily, at least, he said he would see what he thought could be done about getting back from the people to whom they had sold it, and getting it back to me. He said that would take some time. I again said I would wait. I waited in the office until he called Mr. Olson." (Continues to read on page 13, line 15.)

MR. READ: I don't believe he can testify as to what he told Mr. Olson.

MR. ROBERTS: If he heard it, he can.

THE COURT: Just put it in the record, the District Attorney is objecting to all the conversation and the court is admitting it all over objection, and that this, I want to protect the District Attorney on his objections, now, and all the way through, and if there is any doubt about it, I'll let you repeat your objections, but the only way you can try a case like this without a jury is to be pretty liberal in letting in all of it until you review the whole case. Something that looks admissible at one stage will appear to the contrary at another.

MR. READ: I don't mean to be objecting all the time. It is mainly for the record, of course, to show—

THE COURT: I want the record to show all your objections, but I am letting it show now you are objecting all the way through.

MR. READ: All right, sir.

THE COURT: Go ahead, sir.

MR. ROBERTS: (Page 13, line 20) "Yes, he told Mr. Olson the best thing to do to pacify Johnson was to give a like quantity from another catalog of material soon to be issued, the number of which I don't remember."

MR. READ: Excuse me, Your Honor, I was wondering whether or not in view of your ruling, you will consider the Government as having made objection, all the way through, whether there would

be any use in Mr. Roberts going ahead and reading the whole thing now in court.

MR. ROBERTS: Either way suits me, if Your Honor would like it read, if you had rather just read it yourself later.

THE COURT: You can make objections now, this is a different objection here. He is not talking about conversations here, but he is testifying as to another transaction in which War Assets carried on the business.

MR. READ: I would have, I misunderstood Your Honor's ruling while ago, Your Honor. There was a lot of this hearsay testimony about the practice of War Assets Administration I don't believe would be admissible.

THE COURT: All right, let the record show that the District Attorney objects to the testimony here as to the way War Assets bought this rope. I am leaving it in just to show that method of operation.

MR. READ: All right, sir.

MR. ROBERTS: (Continues reading on page 17, line 25) "I notified the War Assets Administration immediately by telephone that the rope had been inadvertently misdescribed and asked that I be released from my commitment." (Page 18, line 1.) "—And I guaranteed to suffer any deficiency between my agreed price verbally made and the selling price."

It suits me for the record to show that the District

Attorney had objected to any of this that is legally objectionable, but I want to put it that way—

THE COURT: Well, I sustain the objection to this much, (line 11-12) "Guaranteed to suffer any deficiency between my agreed price verbally made and the selling price." I don't see that illustrates anything. I will let the rest in to show what was the general way of doing business, and that is the only reason.

MR. ROBERTS: "Mr. Johnson, at the time you purchased for the account of Associated Metals, 541,745 pounds of aluminum, was it your understanding with Mr. Zedekar that he reserves the right to withdraw from sale all or any part of this property without notice?"

MR. READ: I don't believe that would be admissible, I would like to make my objection there, Your Honor.

THE COURT: Well, I am leaving it in. Go ahead, sir.

MR. ROBERTS: "Question: That was not your understanding?" (Continues reading, page 18, line 25.) "Therefore, when you purchased the quantity of aluminum, or 541,745 pounds, it was your understanding that that was a bona fide sale and all of it would be delivered, is that not correct?"

MR. READ: I believe for the record I would have to object to that last sentence of testimony.

THE COURT: I'll admit it.

MR. ROBERTS: "When you agreed to release

the 12,000 pounds you agreed to do that merely as a courtesy, did you not, without waiving your rights as to any other portions of it?" (Continues reading.) (Page 19, line 91.)

THE COURT: I am inclined to think, gentlemen, when we get through with all this, I am going through with a pencil and make a mark through everything I think is objectionable, and I'll let Mr. Read go through with a red pencil—

MR. ROBERTS: Of course there is a great deal in here which we would like—

THE COURT: We can go through the whole thing, and there is lot of repetition.

MR. ROBERTS: There is a whole lots I don't insist on.

THE COURT: No, sir.

MR. ROBERTS: Shall I continue to read?

MR. READ: I have to object to all that, about this conversation.

THE COURT: Is Mr. Olson a witness, or going to be a witness in the case?

MR. READ: No, sir.

MR. ROBERTS: He was identified as head of the non-ferrous metal division in Los Angeles representing the Government.

THE COURT: I doubt seriously if anything the federal employee said after everything was over is

going to be of benefit to the Government. It would discredit his own testimony, if he were going to be a witness, but it would not be admitted—would not be an admission, binding on the Government.

MR. ROBERTS: I don't think it would be binding on the Government, but I think it would be most indicative that he considered it a binding contract with the Government.

MR. READ: I don't think whether he would consider it would make much difference.

THE COURT: I'll admit it at this time. Let's read it through, I'll read it, there is so much that has got to be eliminated, I'll try to get it all at once.

MR. ROBERTS: "Did he know the reason, or was he just giving you his own feeling?" (Continues to read; page 40, line 1.)

"He said that he was forced to repudiate the balance of the contract under orders from Mr. Throckmorton, head of the Non-Ferrous Metals Section, Washington, who is his superior." That would be the same objection.

THE COURT: Yes. All right.

MR. ROBERTS: "When you talked to Mr. Throckmorton, was any reason given to you by him for the cancellation of the delivery of these materials?" (Continues to read on page 40.)

"I had difficulty keeping him on the matter at all." (Line 22.)

MR. READ: There is the same objection to that last testimony.

THE COURT: I am going to rule out line 20 to 23, inclusive.

MR. ROBERTS: Yes, I don't insist on it. "Did he say anything as to why the delivery was not made to any further extent?" (Continues reading.)

THE COURT: I will go back through it, Mr. Read, through the whole thing, I'll let you take a pencil and mark your objections from the first to the last.

MR. READ: All right, sir.

MR. ROBERTS: "Concerning this five hundred thousand pounds—" (Concludes reading deposition.)

MR. ROBERTS: I would like to tender that original deposition, if the Court please, of course subject to objections.

THE COURT: Now, I am going to get defendant's counsel tendering this deposition to go through it and mark out everything in here that is not insisted upon, Mr. Roberts—

MR. ROBERTS: You want me to do it on the original, or rather I had do it on the copy?

THE COURT: You can do it on the original, if you want to. Defendant's Exhibit number [illegible] that is before the next hearing, if you would.

MR. ROBERTS: Suppose I do that, and give it to

Mr. Read and he can do his too. I'll do it in one color pencil and let him do it in another.

THE COURT: With his colored pencil, he had better put everything he is objecting to.

MR. ROBERTS: That's what I mean.

THE COURT: That's right, you take a blue pencil and he can take a red one, for illustration, and you put in all that you are eliminating from it voluntarily, and let him put in another color all he is objecting to, and I guess I will take a third one and indicate all I am striking. The depositions are always about ninety percent surplusage.

MR. ROBERTS: That is all the evidence we have, I believe, Your Honor.

THE COURT: Now, as I take it, that concludes the evidence for both sides, is that right?

THE CLERK: The Government's documents are not in.

MR. READ: We have not had all ours admitted yet, Your Honor, there is, I believe our first six were admitted.

MR. ROBERTS: I don't know whether Mr. Read has got his broken down that way, but, if his could be broken down as to these different paragraphs, and put them in these folders, I believe it would be easier.

MR. READ: Yes, I could do that, Your Honor. I believe you were making notes of some of the exhibits that applied.

THE COURT: Yes, I did. I had a note to this effect, that the Detroit, the exhibits identified as Plaintiff's exhibits 19, 29 and 30—

MR. READ: Well, I can get them together, if Your Honor had rather.

THE COURT: Suppose we do this: suppose you get them admitted for the record and separate them later. I want to close the record on this case.

MR. READ: Do you want me to offer these, one by one?

THE COURT: Just call out the numbers, first give them, check with Mr. Roberts—is there any objection to any of those exhibits?

MR. ROBERTS: No, I have no objection.

THE COURT: Just call out—

MR. READ: I don't particularly want to offer number 8, just strike that off the list—I mean 7—excuse me.

THE CLERK: Are you going to offer everything else?

MR. READ: Yes, from 8 through.

Your Honor, I had a witness I had intended to put up, however he has been waiting around a good bit and looks like he didn't make it this afternoon. I don't think that it would add very much except just maybe some little explanation of the workings of the War Assets Administration.

THE COURT: Well, you will have to decide whether you want—

MR. READ: Of course he is not here.

THE COURT: Next time we put this thing down, you can bring him, if you like. It will be some time, gentlemen, before I can put this matter down for another hearing, and frankly, I am going to ask Mr. Roberts on his cross bill to prepare an outline of the findings of fact which he is asking for, breaking down by each one of these five different things, and state what he contends and what is shown by exhibits, giving the exhibit numbers and what he contends is shown by the testimony; that is referring to the testimony of Mr. Robbins or the testimony of Mr. Johnson here. I believe those are the only two witnesses, isn't that right?

MR. ROBERTS: Of course we had Mr. Throckmorton, and Mr. Dechman, I believe I am going to ask the reporter to write out for me, because I don't know whether I remember it well enough, I mean I would like to wait to do that until I could get it written out, if Your Honor please.

THE COURT: Do you mean until you could get the whole record?

MR. ROBERTS: Well, the oral testimony hasn't been too extended, we have taken up lot of time in between, but I don't believe the actual transcript of the testimony would be very long.

THE COURT: Well, we will set another date for it. You may close the court.

THE CLERK: May I return the documents to them, so they can prepare the findings of fact?

THE COURT: Yes.

(Whereupon the clerk returned the documents to counsel.)

(The hearing was concluded.)

THURSDAY MORNING
October 14, 1954.

(The case of THE UNITED STATES OF AMERICA versus DAVID CENTER, ROBERT ROBBINS, ASSOCIATED ALUMINUM & METALS COMPANY, et al, called for hearing, the following proceedings were had.)

THE COURT: Proceed, gentlemen.

THE CLERK: Documents marked for identification as Defendant's Exhibit number 25, being correspondence pertaining to the Los Angeles transaction, etc.)

(Deft. Ex. #25 marked for identification only.)

MR. ROBERT ROBBINS: Resumes the Stand, having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROBERTS:

Q. Mr. Robbins, I hand you papers identified as Defendant's Exhibit number 25, and ask you what that is?

A. This is correspondence pertaining to the Los Angeles transactions, and also our, the list is the material that was awarded us in Los Angeles, and also lists—

Q. Let me ask you this: Is it the claim you filed with the Government on the Los Angeles contract?

A. Yes, this is.

Q. And is the Government's action on that claim also included?

A. It is.

MR. ROBERTS: That is all.

MR. READ: I think that is already in evidence, the decision on it, Mr. Roberts. Could I have a look at it?

MR. ROBERTS: I think it is up to us, if the Court please, to prove that we have filed a claim, even though it might be in evidence for the Government. I believe I had rather introduce it in my—in support of my claim. I am not sure what is in evidence.

THE COURT: Are you tendering that?

MR. ROBERTS: Yes, sir.

THE COURT: Are you objecting to it, Mr. Read?

MR. READ: No, sir, I don't believe we have any objections.

THE CLERK: That is marked admitted.

THE COURT: That is admitted.

(Deft. Ex. #25 received in evidence.)

MR. ROBERTS: Do you have any questions?

MR. READ: I don't want to—no questions about that—I would like to ask him about another matter before he gets off the stand.

THE COURT: All right.

CROSS EXAMINATION

BY MR. READ:

Q. Now, Mr. Robbins—

Mr. Roberts—were you going to something else?

MR. ROBERTS: I was just going to introduce some documents, you can go ahead, and ask him.

MR. READ: All right.

Q. Mr. Robbins, at the time that these transactions that are the subject of this suit, you were a partner in the firm known as Associated Aluminum, is that right?

A. That is right.

Q. You and Mr. David Center started off in a partnership, is that right?

A. That is correct.

Q. Now, what was the original name of that partnership that you and Mr. Center started off?

A. Well, originally it was started off as the Atlanta Steel and Supply and Associated Metals was a division of it, the name was subsequently changed to Associated Aluminum and Metals, that was the Aluminum Division.

Q. Now, you and Mr. Genter were both in this partnership at all times of these transactions in this suit, is that correct?

A. Yes, sir.

Q. Now, when did Mr. Benamy, S. P. Benamy, come into the partnership?

A. Well, I say that Mr. Center, we also had another partner, A. E. Garber was a partner initially. And we needed additional financing, and that was in the spring of '46 when Mr. Benamy came in.

Q. That was a continuation of the other partnership?

A. I think that was construed as a joint venture. I don't remember, exactly remember, but basically it concerned the same operation, but I don't recall if it was a joint venture or a division of the profits from this venture.

Q. What was the Shower Door Company of America, when was that organized?

A. That was organized in, as a trade name of Associated Aluminum and Metals Company. It was first conceived in '46.

Q. Was that more or less a successor to the Associated Metals Company?

A. In '47 it was, in '46 it was a trade still that was a division of the Associated Aluminum and Metals.

Q. When was it incorporated?

MR. ROBERTS: If the Court please, I don't like to interrupt Mr. Read, but we admit all the Government's allegations to these partnerships, as to their liability in case the Government—it just looks like it is repetitious to get all that in the record.

MR. READ: Well, I didn't—I just wanted that to be clear, Your Honor, I didn't mean to add anything to the record, if that is the—

THE COURT: That admission satisfactory to you on that point?

MR. READ: Yes, I think so. Yes. That is all, Mr. Robbins.

MR. ROBERTS: Come down.

(Whereupon the witness was excused from the stand.)

MR. ROBERTS: If the Court please, Mr. Beers called my attention to the fact we never have tendered this defendant's exhibit number 11, which is the deposition of James McGee Johnson, that was read in court, but I think possibly it should be tendered, Mr. Read and I have gone through it as Your Honor suggested, and marked what I would voluntarily strike, and he marked what he objected to in there. I would like to tender that at this time.

MR. READ: All right, sir. No objection, Your Honor. I believe Your Honor was going to rule on it, as to the parts that were objected to as marked there, at least indicate that as having been objected to.

MR. ROBERTS: I understood I was to mark it with one color pencil, what I would voluntarily strike, and Mr. Read would mark with another color pencil what he objected to, and Your Honor would probably take another color pencil and mark what you sustained objections to.

THE COURT: Yes. Now, before I make my findings of fact and sign them, I'll hear from counsel as to the striking out any evidence in the whole case. If I make any findings that include testimony to which objection is made, I would like to make

a specific ruling on that for the record, so we will have, you might say, a going-over as to all the facts.

MR. READ: Yes, sir.

THE COURT: To see what is objected to, before I make the final judgment.

MR. ROBERTS: Now there is one other deposition of Mr. Morris Lavine. Do you have that, Mr. Beers?

THE CLERK: Yes, sir.

MR. ROBERTS: And I, with Your Honor's permission; we will open that deposition there.

THE COURT: Yes, sir, that is all right.

THE CLERK: Upon order of the court the deposition of Mr. Morris LaVine is opened, and marked as Defendant's exhibit for identification 26.

(Deft. Ex. #26 marked for identification.)

MR. ROBERTS: If the Court please, I would like to tender this on the same basis as the other deposition, that Mr. Read and I take it and mark it the same way.

THE COURT: That is all right.

MR. READ: Your Honor, we have no objection to any—I don't believe that the deposition proves anything, but we have no objection to it as it stands.

THE COURT: That is all right, sir. You can put it all in.

MR. ROBERTS: That is all, as far as the defendants are concerned, sir.

(Deft. #26 received in evidence.)

THE COURT: Now, is the evidence closed for both sides?

MR. READ: I would like to put up a witness, Your Honor.

THE COURT: All right.

MR. READ: First I would like to file, with leave of the court, the defendant's answers to plaintiff's interrogatories that were received back in August, of 1952. We had hunted through the file in the clerk's office for the original of these answers, and I, in going through the file that we had in the office on this thing, found the original, and I believe probably it was filed with us instead of with the clerk, and I would like to have it filed at this time.

MR. ROBERTS: We of course have no objection to that.

THE COURT: All right, let it be filed.

MR. READ: I would like to call Mr. Young to the stand.

MR. HARDAWAY YOUNG: Having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. READ:

Q. What is your name, please?

A. Hardaway Young, Jr.

Q. Mr. Young, where are you employed at the present time?

A. General Service Administration, Atlanta, Georgia.

Q. What sort of job do you have there?

A. I am contracting officer.

Q. Did you ever work for War Assets Administration?

A. I did.

Q. What period, for what period did you work for War Assets Administration?

A. I began working I believe it was about '45, first the Treasury took it over, then Commerce, and RFC, WAC and WAA, I went straight through the line through September 30, 1948.

Q. What was your particular job with those various agencies?

A. Well, I was, at the time I was with War Assets I was Chief of the Textile Wearing Apparel Division, selling surplus property of Textiles and Clothing, shoes.

Q. You had actually to do with the selling of surplus property?

A. I did.

Q. Now, were you familiar with the practices and pro-

cedures of the War Assets Administration and the War Assets Corporation, and the other agencies that dealt with the selling of surplus property?

A. Yes.

Q. Did you have anything to do with the preparation of the various sales documents, or agreements, that were drawn up for the various sales and transactions?

A. Yes, sir.

Q. Can you state, Mr. Young, whether or not the methods and procedures used in the sale of surplus property were the same all over the country with the various War Assets offices, as far as you know?

A. As far as I know, the instructions for the sale of surplus property were formerly in the Washington Central Office and disbursed to all the offices in the States, and they were identical, the procedures were supposed to be the same throughout the country, as far as sales.

Q. Would you explain for us the procedure that was used in the offering and sale of property when title was passed to the property, and about the various sales, documents or agreements, that were drawn up for these sales?

A. Well, to begin with, it depended on the type of sale you were having, the various types, usually there was a sealed bid for the sale, it was advertised with the terms and conditions of the sale in the brochure or in the invitation for sale. You might have a spot sale, of course that was advertised subject to all the terms and conditions of the sale. You might have an auction sale which always was advertised prior to the sale, the actual holding of the sale.

Q. Well, actual offerings, written offerings or brochures were put out on all of these offerings of sale of property?

A. Well, that depended on the priority of the sale. Of course the veterans had first priority for the general public, yes, they were advertised and there was a listing made and sent to all of the eligible buyers.

BY THE COURT:

Q. Well, now, were brochures used in connection with all sales?

A. No, sir, it was either a brochure or invitation for sale, as I recall it.

BY MR. READ:

Q. Now, would you look here, part of Government Exhibit Number 2, the second sheet here, "Sealed Bid Sales, General Information." Would you recognize that as the conditions governing—

A. That is the general conditions governing sealed bid sales of War Assets, continued by any War Assets Office throughout the country.

Q. Now, would you explain if that is a provision, I believe that all property was subject to withdrawal up to the time of actual delivery, is that correct?

A. That is correct. All property was subject to withdrawal.

Q. Now, would you state, aside from any of the actual written conditions of sale set out in the brochures or offerings, what was the general instructions as to the with-

drawal of property, or as to when title was passed, when a bid was made?

A. Well—

MR. ROBERTS: If the Court please, we object to him testifying as to instructions, if they were in writing I think the instructions—I believe he said that the general instructions were in writing, and I think they would be the best evidence.

THE COURT: I think so, if he doesn't have the written instructions here, I'll let you get them up and put them in the record, but I'll let him state subject to being amplified, if necessary, just—I'll let him answer the question.

A. Well, after the bid was advertised and the time of opening, closed, then if property was sold, the document, sales document was issued which composed of inner-leaf copies, carbon copies, and typed all at one time, at one operation, and that was distributed to the purchaser, to the accounting department, to the loading agency holding the property, and that particular property going to the holding agency was their authority to release the property. It might be withdrawn prior to shipment, which was a part of the sealed bid.

BY THE COURT:

Q. Now does that mean, sir, that if an offer is made to a particular office, Detroit, Los Angeles, St. Louis, Louisville, Atlanta, those are the five involved in this case—

A. Your Honor, I know nothing about the particular

sales transactions in this particular case. I am only trying to—

BY MR. READ:

Q. We are not asking you about the particular transactions.

A. I don't know what transpired on that.

BY THE COURT:

Q. Which office were you in?

A. I was in the Atlanta office, Atlanta, Georgia.

Q. You were in the Atlanta office? Well, let's just take Atlanta. I believe in this transaction defendants are relying on the terms of the brochures, is that right?

MR. ROBERTS: On the Los Angeles transactions, yes, sir.

THE COURT: That is on the Los Angeles?

MR. ROBERTS: We are relying on an offering, and it was obtained in a brochure by Mr. Robbins at set prices.

A. Usually all brochures or invitations for sale included the stipulation that the property was subject to withdrawal without notice. I may not understand the question.

Q. Let's see. How do you classify this particular sale involved here?

A. This particular sale, as I have in my hand, was just a special listing offering various types of, apparently aluminum, for sale by War Assets Administration.

Q. Was it advertised by sending letters out to particular dealers?

A. Well, this apparently was to be sent in as a sealed bid and opened at 2:30 P.M., September 27th.

Q. Now, counsel agreed on that?

MR. ROBERTS: I don't know what he is looking at, Your Honor.

THE COURT: What I wanted to do, gentlemen, is to get one specific transaction involved in this case, as a guinea pig, you might say.

MR. READ: All right, this, then, Your Honor, is involved in count 1 of the Government's complaint, it was a suit for a hundred ten dollars and one cent, as I remember—I forget the exact amount, but it was count 1 of the complaint, and I believe it was taken care of on pre-trial, that this particular document here did govern as to the transaction sued on in count 1.

A. I see this document that I have in my hand, it was a listing of various properties offered for sale with the request that sealed bids be received by 2:30 P.M. on September 27, 1946, which constituted an invitation for sale, sealed bid type.

THE COURT: Let me see that, please, sir. That is marked Boston Regional Office. I don't believe we have anything here involving Boston, do we?

MR. READ: Just count 1 of the complaint, your Honor. We have not taken that upon the trial, I believe, because that was agreed at pre-trial that

these particular documents would govern as to the, as to that transaction.

THE COURT: As to Boston?

MR. READ: Yes, sir.

THE COURT: Gentlemen, this is very, very involved, and I would like to understand this testimony as it comes in, and I don't mind counsel stating what it is they are proving by the witness, which transaction it refered to and just where it fits into this picture, but to give me little segments of testimony and scattered around, I can't fit it in the proper place.

MR. READ: Your Honor, with Mr. Young, I just intended to prove from him as an employee of War Assets Administration what the practices were, and what they did, actually, in the sale of the property.

THE COURT: That is all right. Would you mind tying that in to these specific instances? Now I am making notes here, I have got five sheets of paper. Los Angeles, Detroit, Atlanta, St. Louis, and Louisville.

MR. ROBERTS: If Your Honor please, all of those are involved in your counterclaim, there are one or two minor questions settled in evidence on pre-trial.

THE COURT: Isn't the whole case on your counterclaim?

MR. READ: Yes, sir.

MR. ROBERTS: As I remember it, a couple of questions, inconsequential comparatively on one or two counts.

THE COURT: All right, we are talking about the counterclaim now, and we are talking about the failure of War Assets, or some other branch of the Government to sell to these defendants certain things which they bought.

MR. READ: They claim they had bought.

THE COURT: They claimed they had bought.

MR. READ: Yes, sir.

THE COURT: Now you say there is a Boston transaction in the case.

MR. READ: Not in the counterclaim, that is a very small part of it anyway, Your Honor, I believe, just a little over a hundred dollars which was all sued for in that.

THE COURT: Since this witness was working in Atlanta, it may be he can testify about that procedure along with the National procedure, so could you take Atlanta as a basis for, to start on then, Mr. Read?

MR. READ: All right, sir.

I believe Mr. Roberts has all of the documents on the Atlanta—

THE COURT: Mr. Robbins said he didn't have any brochure on the Atlanta transaction, and he

said that the bid was probably by telephone calls, I believe, isn't that the testimony by Mr. Robbins, as I recall—

BY MR. ROBBINS: As I recall, yes.

MR. READ: We don't have much documentation on the Atlanta transaction except an invoice here.

BY MR. READ:

Q. Would you look at Defendant's exhibit number 10 there, Mr. Young, and tell us what kind of paper that is. I believe it is marked "invoice."

THE COURT: That contains conditions, is said to—

Q. On the back stamped "Terms of Sale."

A. This is an invoice with the terms of sale printed on the back of each of the copies.

MR. ROBERTS: I might say, Your Honor, that the Atlanta transaction is based purely and simply on the delivery we claim of wrong materials and our claim is based on the cost of handling the wrong materials, that they didn't deliver what we contracted for.

THE COURT: Well, then, that wouldn't be—

MR. ROBERTS: And your claim is based on just purely and simply the cost that we had to incur to handle those materials which we didn't buy.

A. This is an invoice, billing the purchaser for the material.

THE COURT: You are not complaining then, Mr. Roberts, of any damage by virtue of the breach of the alleged contract?

MR. ROBERTS: Well, only in that they sold us one kind of goods and shipped another kind of goods which our purchaser, it was shipped directly to our purchaser and he couldn't use it, and he billed us back for the amount involved in re-packing and re-shipping it. We claim—

THE COURT: You are not claiming—

MR. ROBERTS: We are not claiming any loss of profits because of failure to ship as we are in others.

THE COURT: All right. Maybe we had better take another one up, then.

MR. READ: Well, I might ask him, Your Honor, while we are on this particular transaction, some that might have a bearing on the others.

THE COURT: All right.

Q. Now, this defendant's exhibit number 10, marked "invoices" there are several sheets here, would you be able to state, Mr. Young, whether or not that is the only documents, sales document, that would have been issued regarding that particular transaction involved there?

A. There would have been a sales document issued. This particular paper I am not too familiar with, I believe it is an invoice which is sent out by the accounting division for payment.

Q. Would you state whether or not that is after the shipment of goods?

A. Yes. It wouldn't be invoiced until it was shipped.

Q. All right. Now, that was Defendant's exhibit number 10 that we were talking about. Your Honor, I am trying to illustrate one point there and if I might take care of that maybe we can go on to some other transaction.

THE COURT: What are the conditions stamped on the invoice? Now, I don't see anything in this terms of sale on this defendant's exhibit 10 involved in this case. I would like for it to be pointed out to me. One is the accuracy of the seller warrants the accuracy of the description of the property, but it doesn't warrant its suitability. We are not involved in that.

MR. ROBERTS: Of course we have introduced, if the Court please, to show what they sold us, and then we have other evidence as to what we received, and we say it was the wrong materials.

THE COURT: Yes. Well, now, this doesn't cover buying one thing and getting another.

MR. ROBERTS: They warrant the accuracy of the description, as I understand it.

THE COURT: Yes, they warrant the accuracy of the description.

MR. ROBERTS: We say it does not describe what they shipped us.

THE COURT: It looks to me like, though, fundamentally what we are involved here on the cross-claim is this: first the defendants here have a legal and binding contract with the Government for sale, which the Government breached.

MR. ROBERTS: That is the first premise of our counterclaim.

THE COURT: That's what I am concerned with, is whether under all the circumstances there was a binding contract of sale, and no doubt there was an offer of sale. Now—.

MR. ROBERTS: We will of course in this instance, this Atlanta transaction, certainly, that is what they gave us as their sales document which you have in your hand there.

THE COURT: I take it, Mr. Roberts, that you contend that the offer came from the Government and you accepted it?

MR. ROBERTS: We contend that we went up to War Assets and bought that material, which is listed on that document there, and that they shipped part of it, and part of it they did not ship.

THE COURT: When you went up there and bought it, do you contend that you made a written offer, or oral?

MR. ROBBINS: Your Honor, may I inject something?

THE COURT: Yes.

MR. ROBBINS: I'm afraid this last document

might tend to confuse the issue a little bit. Was the date of that document prepared September, '46 in Boston?

MR. ROBERTS: I don't know. Let's don't get into that.

MR. ROBBINS: I'm afraid it will confuse it.

THE COURT: We are not talking about Boston.

MR. ROBBINS: No. The reason I wanted to make mention of that is because that, as I recall, is for sealed bids for some sort of aluminum sheets which were sold as scrap, and had nothing to do with the sheets purchased which were sold at set prices.

THE COURT: Well, I don't think we are involved in that right here, sir.

MR. READ: Your Honor, the point—

MR. ROBERTS: Judge, frankly, Your Honor, we don't know how we bought that material, but we know we did buy it because that is evidence of purchase of it right there.

THE COURT: Well, to sustain your cross action, I first must find that you had a legal and binding contract.

MR. ROBERTS: We think that document there sustains that claim.

THE COURT: And to do that, now a contract takes two things: it takes an offer on one part, and unconditional acceptance on the other. So first I

have got to find which one made the offer, and which one accepted. Now—

MR. ROBERTS: As I remember it, Mr. Robbins said, it is in the record, I mean this transaction, I proved by Mr. Robbins way back yonder, as I remember it, I am not sure, because I have gotten a little foggy, but as I remember, he said they called him and told him they had these materials and he went over there and bought them.

THE COURT: That is exactly what I am trying to pin down.

MR. ROBERTS: I think that is in the record too, this transaction.

THE COURT: It is, yes, sir. Take Atlanta, for instance. I have on my notes here, Mr. Robbins testified as to the brochure, he said he doesn't have any, is that right, you don't have any brochure?

MR. ROBERTS: We have not been able to find it. Maybe he did say a brochure was issued.

THE COURT: And he said, he made claim to certain amounts, he was allowed a hundred eighty seven dollars and twenty eight cents claim on shortage.

MR. ROBERTS: That is all in the claim. The Government's action is all in the record.

THE COURT: Now, are you, you are claiming additional amounts, is that right?

MR. ROBERTS: Yes, sir.

THE COURT: And you are, your claim on Atlanta transaction for an additional amount is that you say, that some one called Mr. Robbins by telephone—

MR. ROBERTS: Well, I am not sure about it, maybe this is the one where he had a brochure which he made a bid on, but he doesn't have the brochure now.

THE COURT: I think he said, he says he doesn't have any brochure.

MR. ROBERTS: He doesn't have it now, no, sir.

MR. READ: He didn't remember whether it was —I think he questioned him about all of these transactions, he didn't remember whether there had actually been a written brochure.

THE COURT: Let's get the contentions on the Atlanta transaction, Mr. Robbins can state them, if he wants to. This is very informal.

MR. ROBBINS: I think I can help clarify that. I think if you will look, you will find this was in the early stages of surplus sales. This was in, it was advised, delivered March 18, of '46, and it was before the time that the War Assets, this gentleman I think can verify this, in the early part of '46 is before they were, went into the veterans priorities, and before they had the formal issuances of these various sales catalogs, and we would have customers who would ask us for certain types of materials, and we would check the various agencies throughout the country, they had their own list, and it was

a matter, they would say, we have that material, and we would say we wanted to buy it, and that was the way the sale was handled at that time. I don't think you will find formal catalogs back in March in the Atlanta office, and I don't recall any—

THE COURT: How do you contend, Mr. Robbins, you bought this in Atlanta?

MR. ROBBINS: In this particular case?

THE COURT: Did you first approach them, or they approach you by brochures and advertisements?

MR. ROBBINS: No, sir, I don't think they approached us because we tried to keep a record of all the metal that various agencies in the country had for sale. They were fixed at a set price and when we would have a customer that needed some metal, we would have our own inventories of what War Assets had and we called them to verify that they still had it, and we would offer to buy it, and they would offer to sell it simultaneously. Who made the original offer I imagine would be us, because we knew that they had it, we had it listed from their own records.

THE COURT: Do you have anything on this Atlanta transaction except an invoice?

MR. ROBERTS: We don't have anything except that and our claim, which was passed on, part of it allowed and part of it by War Assets—

THE COURT: Let me see the invoice on it. Have you got that? This is Defendant's 10.

Now, this is where this gentleman on the stand might come in; was that one recognized which, in which these various offices sold it, that a purchaser would come in and say, do you have such and such, and they would say, yes, and then they would make an order in some way, then an invoice such as this one?

MR. ROBBINS: As I recall, Your Honor, metals were scarce materials and only certain people allowed to purchase them, and they probably had a listing of what was available, and those people that were authorized to purchase would be notified that it was available, and they either made, purchased it there with a sales document at the time of purchase, the sale, as I recall it, was not a sale unless a sales document was issued.

THE COURT: Now, look at—

MR. ROBBINS: Apparently that was bought on credit, I don't know, and that was later invoiced by the accounting department to collect for it.

THE COURT: Look at Defendant's Exhibit 10, and tell me if in your opinion that represents a sale and agreement between the Government and the purchaser. Look at that please, sir, and answer that question. Tell me why.

MR. ROBBINS: Looking at this document, I would say they had a sales document for the purchase of this material, and it was later invoiced by the accounting department to collect for it.

MR. READ: That represents that invoice that was sent out later then.

THE COURT: When you say that you are assuming they had a sales document. Make that a little clearer, please, sir.

MR. ROBBINS: Every sale, as far as I can recall we had to have a sales document signed by a contracting officer, and accepted by the purchaser, both parties signing the document.

THE COURT: Would that always have to precede?

MR. ROBBINS: That would precede this invoice.

THE COURT: The sales document?

MR. ROBBINS: And the sale of the material was subject to withdrawal, or as is, where is, they were always urged to go out and inspect the materials.

THE COURT: That's what I am trying to find out.

MR. ROBBINS: See, if it was there and see if it was actually what they advertised, Your Honor. Your Honor—

THE COURT: Wait just a moment, not so fast, please, sir. Let me ask counsel if there is available in this case any such sales document that he has referred to?

MR. READ: We have introduced several here, Your Honor, and I was about to ask him here about one.

THE COURT: Let's take the Atlanta—

MR. READ: We don't have the sales document.

MR. ROBERTS: We have not been able to find a sales document either, if the Court please, whether there was one or not, I don't know.

THE COURT: Let me ask Mr. Young then—

Q. Mr. Young, assuming that no sales document was made in this Atlanta transaction, assuming that Defendant's Exhibit 10, that invoice, is the first document issued, why would that not constitute a binding contract of sale? I realize I am asking for a lot of conclusions, but that is all right, I'll get to the issue this way. Why doesn't that—

A. I would offhand say that apparently there was a sale issue and that the accounting department must have gotten a copy of the sales document in order to have prepared this invoice.

Q. Then assuming that was issued in due course, that invoice represents the terms of a sale between these parties and the Government, does it not?

A. Well, I would say that this represents what property was listed on the sale of the material, but that doesn't necessarily mean that what was listed was always there. If there was a correct description of the items—

Q. Would the Government have issued that invoice unless it was there?

MR. READ: Here is a copy of one of the actual sales documents that he testified were issued, and

had to be issued before the property could actually be shipped and there are conditions of sale there on the back of that, that—

MR. ROBERTS: Of course it is our contention and I think we proved that in, particularly in metals, that a sales document was not issued until they actually shipped the materials out of the warehouse, that the sale in nearly every instance happened long before that.

THE COURT: Just a moment, I think we are making progress, Mr. Read, assuming a sales document similar to Plaintiff's Exhibit 5 had been issued in this Atlanta transaction, what condition in that is involved in this case?

MR. READ: In the Atlanta one, Your Honor?

THE COURT: Yes.

MR. READ: In the Atlanta one, none of them, I don't believe, but my purpose in getting Mr. Young to explain this was to show that these conditions of sale were never sales documents—

THE COURT: I tell you we are going to get confused again. I'm trying to take these things one at the time, and you say the conditions in Plaintiff's Exhibit 5 are not involved in the Atlanta sale?

MR. READ: Other than undoubtedly there were some on the back of a sales document, that was part of the sales document, that he has been testifying to, that it had to be issued in order for the property to be shipped.

THE COURT: Isn't it rather nebulous to say that evidently in the Atlanta transaction some terms were on the back, some conditions were on the back?

MR. ROBERTS: They put some conditions on the back of that invoice, I think—

THE COURT: Unless I know what conditions there are on there—

MR. ROBERTS: I think the presumption would be—

MR. READ: That's what I wanted to get Mr. Young to bring out here, that these sales documents were issued, the conditions, standard conditions of sale were on every sales document.

THE COURT: But you said a moment ago the standard conditions in Plaintiff's Exhibit 5 do not affect Atlanta in that transaction.

MR. READ: Not as far as what—as the issue involved in the Atlanta transaction, as Mr.—

THE COURT: All right, sir.

MR. ROBBINS: Your Honor, may I go over what I remember on that from the inception of the material—

THE COURT: No, sir, I'll have mental indigestion if I get any more here until I assimilate what I already have.

MR. ROBBINS: All right, sir.

THE COURT: Now, let's take the Detroit inci-

dent, and see if there is anything this gentleman can throw any light on on that.

MR. READ: Mr. Roberts, by the way, Your Honor, on that agreed and stipulated that the standard conditions of sale were on the back of the sales document he introduced regarding the Detroit transactions.

THE COURT: Take Plaintiff's Exhibit 19, Mr. Robbins denied that conditions were on his copy, and said the conditions were put on there after an agreement and after the shipment, which was their conditions, their contentions on this Atlanta transaction, that those things were stamped on there after the sale was all over.

MR. ROBERTS: Well, of course, if Your Honor please, we stipulated with that, there was—

THE COURT: Look at Plaintiff's Exhibit 19 there.

MR. ROBERTS: That's nine, I believe.

MR. READ: Here it is right here.

THE COURT: No, the Defendant's exhibit nine and Plaintiff's exhibit 19.

MR. ROBERTS: This is what we got without anything on the back of it (referring to Deft. 9). That is Defendant's Exhibit number 9. Of course it is our contention also that long before any of this was issued to us, we have had a contract for it.

THE COURT: Mr. Robbins said he wasn't relying on any brochure for Detroit.

MR. ROBERTS: No, sir.

THE COURT: Now, in this case, I think you had a sales document here, Defendant's Exhibit 9.

MR. ROBERTS: Yes, sir, they are here, sir. Of course it is our contention, if the Court please, we had an oral contract with the Government prior to that time there, that these things were issued when they shipped it.

THE COURT: I don't know whether the Statute of Frauds is involved in this case, but ordinarily an oral contract—

MR. ROBERTS: I have a great deal of evidence, a I mean a great number of decisions, if the Court please, that an oral contract is good to the Government.

THE COURT: Well, that is—Well, get the facts on this now. Let me ask Mr. Young,—

Q. Referring to the Detroit transaction and referring to Defendant's Exhibit number 9, which I have here, is this or not such a preliminary agreement as would precede the invoice as we were referring to a few moments ago in connection with the Atlanta transaction? Would you see whether that is—

A. This is an agreement, as I see it, of the sale of this material, and which would precede the invoicing of this document by the accounting division.

MR. READ: Your Honor, I might point out here, regarding also one of the Detroit transactions, we have a sales agreement which obviously has on the

back the conditions of sale we were talking about, stating that those were the only conditions that would govern.

THE COURT: All right. Now, let's get this straight here is Defendant's 19, Mr. Young—

MR. READ: Plaintiff's 19?

THE COURT: Plaintiff's 19, see what that is, sir.

A. This is a sales agreement, as I see it, an old form originally used by Reconstruction Finance Corporation, and struck out and written, War Assets Administration. Apparently they were using them.

THE COURT: All right. I want to get you and Mr. Read to tell me which one of those two pertain to this claim of the defendant under the Detroit sale.

MR. READ: Undoubtedly both of them do, Your Honor.

THE COURT: Why were there two agreements of sale made?

A. Well, it looks like, Your Honor, one of the sales covers material located at a different location than the one shown. No, I take that back— It is the same document, but—

MR. ROBERTS: I believe, Your Honor, that 19 is one of the triplicate copies of that 10, I am not certain about it, and they just gave us the wrong copy. I don't know.

MR. READ: I believe they made about eight or nine, they had eight or nine copies of these sales

agreements, some of them had the conditions of sale on the back, that is— the buyer's copy.

THE COURT: I want to get your contentions on this. I am going to have to hold you gentlemen to what you contend on that. This is very confusing and the defendant here is putting in one, and the Government is putting in another.

MR. READ: I think they are part of the same thing, though.

THE COURT: Why not eliminate the Plaintiff's exhibit entirely then, if they are the same.

MR. READ: Because on our exhibit, Your Honor, it shows, I believe that they were furnished to us by the defendant, the buyer's copy shows that the— plainly on the back, what were those conditions of sale we contend govern on all of these sales.

THE COURT: The defendant has those conditions put on there after the agreement was made, and after the shipments.

MR. READ: Your Honor, the last time we tried this case, that was brought up, I believe he introduced some sales documents, and it was plain enough to see that through on the other side, there were conditions of sale, and when I made objection to it, Mr. Roberts stipulated as to the Detroit transaction, the conditions of sale, the standard conditions of sale would govern.

MR. ROBERTS: No, I made the stipulation—

MR. READ: I think that is in the record.

MR. ROBERTS: I made the stipulation that the standard, the standard conditions of sale were on the back of these documents.

THE COURT: You made a stipulation as to docket numbers, now what that means, I don't know.

MR. ROBERTS: I made a stipulation that if we had the original of these documents right here, the standard conditions of sale would be on the back of them. That is my understanding of what I stipulated. I don't think there is any doubt about it, because you can see where the phosostat picked them up.

MR. READ: That's right, and they don't show on the copies here the defendant introduced, so undoubtedly there were other copies.

MR. ROBERTS: Of course it is our contention that none of these things were given to us at the time of the sale, but at some later date.

THE COURT: What I want to know is this: Mr. Read, what proof does the Government have that the conditions on which the Government is relying were agreed to before the goods were shipped and accepted? Now you have them on your invoices, but what proof do you have that those conditions were made a part of the sale?

MR. READ: We are not—as to the invoices, we say the invoices came out later, and getting Mr. Young here to testify that is a matter of practice,

that the property could never be shipped out of the warehouse, wherever it was held, until the sales documents were issued and a copy furnished to the warehouse.

THE COURT: Well, now, I want to get this straight, if there was any secret instructions given to the Government agents, which the other party didn't know, I don't know that they would be bound by it, but insofar as you are relying on written conditions, I want to get it in the record here, how those written conditions were brought to the attention of the defendants,—

MR. READ: All right, sir.

THE COURT: Before they accepted the goods.

MR. READ: I think Mr. Young can probably explain it for us, Your Honor.

THE COURT: If Mr. Young will show me any paper which constituted a sales agreement before there was delivery and acceptance whereby there were conditions in there, which were given the defendants, that's what I want to get.

MR. READ: All right, sir. I would like for him to look at here, Plaintiff's Exhibit number 5, which is a copy, copy number 7 of a sales document, Your Honor.

THE COURT: Plaintiff's 5, that refers to which? That doesn't refer to Detroit, does it?

MR. READ: No, sir, it refers to Philadelphia.

THE COURT: That's different.

MR. READ: But—well—it is our contention, and I believe Mr. Young will testify that the same kind of sales agreements were in, used all over.

THE COURT: Well, let's first see what we have on Detroit, then if we can't prove it that way, we might go into general custom.

MR. READ: On Detroit, you can not see the conditions of sale, because they are on the other side, and I believe that they are, they are pretty well standard and I wanted to get Mr. Young to look at this, to say this—

THE COURT: You are speaking of Plaintiff's Exhibit 19?

A. No, sir.

MR. READ: Yes.

THE COURT: Plaintiff's Exhibit 19 is your sales agreement, which preceded the invoices.

MR. READ: Yes, sir.

THE COURT: Are your conditions on there?

MR. READ: Yes, sir, on the back, except you can't read them, and that's what was agreed that was the standard conditions of sale as shown here in Plaintiffs Exhibit number 5, would be the one.

THE COURT: What does that condition say, the part about it that is material?

MR. READ: It furnishes the parties with description of the sale of the property specified and the

buyers' invoice comprising the terms stated therein, and then Conditions of Sale, and goes on in this particular one, it has ten of them, says—

THE COURT: Just the ones that are involved, there are lots of conditions.

MR. READ: Well, for one, that sales are subject to such adjustment upon the request of the Purchaser as the War Assets Administrator, or his authorized representative, in his sole discretion, may determine to be equitable under the circumstances, and any such determination shall be final. Requests for such adjustment will be considered only if filed in writing in the office of Seller responsible for the sale within fifteen (15) days (or such additional period as may be allowed in writing by the Administrator or such representative) after removal of the property by Purchaser or delivery by a common carrier at the original destination.

THE COURT: I don't think that is involved in this case, is it?

MR. READ: Yes, sir, and in no case was the request, no case that I remember that the material was, that request for adjustment was ever filed within fifteen days, and when they were filed, they were all uniformly turned down by the Administrator.

THE COURT: That contract can't set up administrative procedure which is going to bind this court.

MR. READ: That is a part of the contract.

MR. ROBERTS: Not only that, if Your Honor please—

THE COURT: That is sort of like a contract to arbitrate in common law, it is not binding at all.

MR. ROBERTS: Not only that, when we do file, they go ahead and process under the regular procedure, and act on it, they certainly waive it, even if it were binding.

MR. READ: It seems to me, Your Honor, that is part of the contract, that is both of the parties certainly agreed upon it when they entered into the various transactions, that is the basis of our contention all the way through.

THE COURT: Defendant's Exhibit 22, copies of claims and letters which Mr. Robbins filed with the War Assets, and Defendant's Exhibit 23 is a letter from War Assets denying 14 claims. According to that they did make a demand, and refusal. I'm trying to eliminate all the so-called issues in this case that are nothing but confusing.

MR. ROBERTS: He is making the point we didn't make it within fifteen days, but we say—

MR. READ: I say in some cases they did, but in any case under the contract governing these sales, when the Administrator made his decision, that was final.

MR. ROBERTS: Oh, I didn't—

THE COURT: All right, what other conditions do you have there that you are relying on?

MR. READ: As to the Detroit situation, I believe that is the main one.

THE COURT: Well, now, Mr. Read, assuming, without deciding, that these defendants had a valid and binding contract on the Detroit, I think the evidence shows it was not delivered. Is that your sole defense there, that that condition of adjustment, is that your sole defense there, that the clause you read about adjustments, fifteen days—

MR. READ: Well, it is our contention also there never was a sale, the sale never was completed.

THE COURT: Well, now, let's go back to that, Plaintiff's exhibit 19 there, constitutes a sales agreement, right?

MR. READ: Yes, sir, and Defendant's Exhibit 9 constitutes an agreement of sale.

THE COURT: All right, why is there no agreement of sale? They purport to be. Now why are they not?

MR. READ: Your Honor, I am a little bit, we get so involved in this situation, I am not sure what Your Honor is driving at.

THE COURT: When we had this up before, I requested counsel for both sides to make very detailed findings on all these things and submit them to the court, so I could compare them back and forth. That has been my practice in all matters of a very involved nature, so I am trying to do that now.

MR. ROBERTS: I knew Your Honor asked that, but I thought you meant for us to do it at the end of the evidence. I will be glad to fix it, but I don't

see how we can very well do it until we get the evidence.

THE COURT: All right, but I think what we are doing now, we are getting down to the specifics. I want you to put in such a findings.

MR. ROBERTS: Yes, sir.

THE COURT: I never did kill any birds by just shooting into the covey. They always go right on.

MR. READ: I am not sure just what the situation is.

THE COURT: Now, we can pass over on that, and let you study that, Mr. Read, and as I say, I think we are definitely making progress.

Lets take up Los Angeles. My notes show the Government introduced, and defendant introduced, 9 to 15 inclusive, and maybe 19 to 28, and also 18. Yes, U. S. Exhibit 18. That is sheet number 3 of the United States Exhibit number 18, which is Mr. Robbins letter to the War Assets.

MR. ROBERTS: We introduced number 4, which is a catalog number C-131, which we say is the offering by the War Assets. We introduced Defendant's Exhibit number 6, which we say was our offer to purchase.

THE COURT: Now, let ask Mr. Young, show him Defendant's Exhibit 4, please, sir, and let's get the Government's view on that.

A. This is listing used by Reconstruction Finance

Corporation, listing non-ferrous metals for sale, offer for sale by the Government.

BY THE COURT:

Q. So that does constitute in your opinion an offer, is that right?

A. Yes, sir, constitutes an offer.

Q. All right, sir. Let's look at Defendant's Exhibit 6. What is that, sir?

A. This is for submission of offers to buy certain materials listed on this attached paper.

Q. Now would you kindly compare that offer to buy with the catalog and see if they are in accord with each other? You may take your time. Mr. Read might want to help you on that, but I think that is important.

MR. READ: I don't think there is any question but what the number came out of the catalog.

A. If these numbers are like in the catalog, I would say that is a firm offer to buy at these sales prices in our brochure.

Q. All right.

A. But I don't know that they are now. I have not checked that.

Q. Any concessions made and later it turns out to be erroneous—

MR. ROBERTS: I don't think there is any doubt they were taken out of the catalog.

THE COURT: Now, I would like to know if the defendants made an order in accordance with what was in the catalog, why that offer and that acceptance would not constitute a contract?

MR. ROBERTS: We think it does, Your Honor. We also—

MR. READ: They have not proved any acceptance, Your Honor.

THE COURT: Well, the offer in the catalog is the acceptance, shown by Defendant's Exhibit 6. Why would that not constitute a contract?

MR. READ: I believe the offering is an invitation to make a bid, which the defendants did. That bid was never accepted by the War Assets Administration, not in part, there were various shipments out of the catalog, various individual shipments that were made, I believe some hundred thirty thousand pounds were shipped, each one on a separate sales document, each one of them being a separate sale.

THE COURT: That is probably a question or law right there.

MR. ROBERTS: Of course we say we have proved that they went further than that, sir, and accepted that offer.

THE COURT: Now, let's go to that question, U. S. 9 here is an invoice from the War Assets to the Defendant, testified by Mr. Robbins that that was correct. This is a Los Angeles transaction, and I thought Defendant's nine related to another one we had gone over.

MR. ROBERTS: You said U. S. nine: Defendant's 8, now—

THE COURT: Defendants eight is the acceptance of the offer, that's what we need right now.

MR. ROBERTS: Now defendant's eight is the acceptance of subsequent offers, but we have in the record evidence that we received one on this same form as to this total offer, and we have attempted to prove the loss of that, and I think have done so, to enable us—

MR. READ: That is certainly a little bit different than the contention they were just making, Your Honor, that the offering of the Government was the bid, and they accepted it when they wrote that letter of the 19th.

THE COURT: Of course he could make both contentions.

MR. ROBERTS: Make both claims.

THE COURT: But Mr. Roberts, is the one you say you lost the one you said you sent to the non-resident counsel?

MR. ROBERTS: Yes, sir.

THE COURT: I'll have to state in all frankness I don't think you have proven—

MR. ROBERTS: We have taken his deposition.

THE COURT: That's different, but up to the last hearing—

MR. READ: We don't think it is proven in there, Your Honor.

MR. ROBERTS: That is a question for Your Honor to decide, but we have taken Mr. Lavine's testimony in Los Angeles on that point.

THE COURT: There you sought to show that the Government sent you an acceptance.

MR. ROBERTS: Sent an acceptance on the same form as Defendant's Exhibit Number 6, as to the main transaction.

MR. READ: I don't believe the testimony will show that he remembered anything, that he had accepted just a mimeographed form, Your Honor.

MR. ROBERTS: Of course that is a question of record, as I remember, he testified positively he got a form like this as to the main transaction, but it was sent to Mr. Lavine, and Mr. Lavine lost it. Of course Mr. Cohen testified he sent it to Mr. Lavine, and couldn't get it back, and I think we, pursuant to Your Honor's comment at the time that you didn't think Mr. Cohen's testimony was proper without Mr. Lavine's, we took the deposition of Mr. Lavine in the interim period.

THE COURT: So the defendant is making the contention that the catalog D-4 ran the offer to buy, D-6 constituted a contract, but whether it did or not—

MR. ROBERTS: That they later accepted it anyhow.

THE COURT: They later accepted it. All right. Now, let's see, gentlemen, the St. Louis transaction, see what the issues are there. Defendant's 19, War Assets, let's see that number 19.

MR. ROBERTS: The St. Louis transaction we are depending on a letter from a Mr. Gunter, which is Defendant's Exhibit Number 19. The evidence is that we got in touch with Mr. Gunter by telephone, as I remember, maybe went there, I don't remember which, and this letter was a confirmation of the sale of material listed in it, to us.

THE COURT: Is there any sales agreement or invoice on the St. Louis—

MR. ROBERTS: We don't have one, sir.

THE COURT: No sales agreement, no invoice.

MR. ROBERTS: No, sir.

THE COURT: That is Defendant's 19, in the nature of an admission by the Government.

MR. ROBERTS: I'll let your Honor see it. It is very short.

THE COURT: In that case there was some sort of agreement. They said they were holding it for your account, and it has got the description of it, and the price.

MR. ROBERTS: And our testimony was that we gave them shipping instructions on that material, and they refused to ship it.

THE COURT: What do you say to that, Mr. Read?

MR. READ: We say, Your Honor, that the title to the property never passed until it had been shipped, and that the Government kept its right to withdraw any or all of the amount bid for, at any time, up to shipment.

THE COURT: But, suppose they demanded shipment, and it wasn't shipped. Would that be equivalent to—could you cancel it out after they had requested shipment?

MR. READ: Yes, I believe at any time up until the time it was shipped, it could be withdrawn.

THE COURT: Well, let me ask Mr. Roberts if shipping instructions were given.

MR. ROBERTS: That is the evidence, as I remember it, sir. Of course he is depending now on something in these standard form of sale agreements.

MR. READ: I am depending on Mr. Young's testimony as to what the practice and procedure was as to that, and as to when title passed to some extent too.

THE COURT: I would like to see a copy of defendant's shipping instructions, if that is in evidence. There is also a letter to War Assets, Defendant's Exhibit 5, maybe that is it, a copy of it.

MR. READ: Even there may have been a brochure that had cer ain conditions, Your Honor. Mr. Robbins testified he didn't know, he didn't remem-

ber, if there was he didn't have it, so that was very inconclusive on that particular transaction.

THE COURT: I believe that the statement was made you couldn't find the copies of the bid.

MR. ROBERTS: This letter refers to his letters of April 15th and 17th, which we have not been able to find, apparently those letters are where he asked, I don't know what these letters were, because —I had made a thorough search and I have not been able to find them. Apparently those letters ask this office to sell them this material and they write back and say they are holding them for his account. We don't have anything else except the claim which was filed.

THE COURT: Mr. Robbins testified that the United States had the right to call in the commitments under certain conditions and that as far as any right went, I don't remember on that.

MR. ROBERTS: The only condition I know that the Government had any right anywhere, is where the property itself was withdrawn from surplus prior to delivery. I don't think there is any doubt that there is a right, a matter of withdrawal, and I have authorities to that effect. Nor that the War Assets had the right to withdraw it from sales, but the only agency, which was the Armed Services, and the purpose for that being there was because, even though they had declared certain property surplus, if before it was sold they needed it back, the War Assets gave them the right to withdraw it from surplus.

MR. READ: That is just a contention, Your Honor, there is no evidence in the record.

MR. ROBERTS: I have got cases which hold that that's what that provision means.

THE COURT: That statute on the question of surplus sales—

MR. ROBERTS: Well, the surplus property act, but I am afraid it is too general, these cases do interpret the surplus property act in deciding, but that part of it, these terms of sale meant that, I don't think there is any doubt that's what it meant.

THE COURT: Well, now, under the facts of the St. Louis sale, the defendant I assume is depending on these three exhibits, Defendant's Exhibits 19, 5, and 20.

MR. ROBERTS: And Mr. Robbins' oral testimony.

THE COURT: Was his testimony to the effect that he—

MR. ROBERTS: He gave shipping instructions.

MR. READ: I don't believe that would be admissible without written instructions themselves.

MR. ROBERTS: He also testified that he had lost the copies of the shipping instructions. I think that the Defendant's Exhibits 5 and 20 tend to support our claim, because we filed a claim and it was turned down on an entirely different basis not on the basis of no contract.

THE COURT: Well, that substantiates perhaps on the question of that he made a sale and they holding it for you, where you gave shipping instructions, if he didn't have a copy of it, and the Government doesn't have a copy, why that is—

MR. READ: No motion has been made on the Government to produce it, Your Honor, I don't know whether we do or not. I have not found it in anything that I have. I don't know, but nobody has asked us to hunt for that.

THE COURT: You say no motion, no notice has been given to produce it?

MR. READ: No, sir.

MR. ROBERTS: No, sir, I—the reason I have not as I remember it, it was stated at the pre-trial conference that they didn't have it. I am not certain of that now, it has been so long.

THE COURT: All right, sir. Now, on the St. Louis—on the Louisville claim, I have a note here, Defendant's Exhibit 15 from the War Assets, photostatic copy—

MR. ROBERTS: That is an invoice.

THE COURT: An invoice, and there were conditions on that, it is agreed that the conditions were on the original.

MR. ROBERTS: That's right, standard conditions.

THE COURT: Now was there in that case any preliminary contract of sale prior to the invoice?

MR. ROBERTS: None that we know of. Yes, I believe 16 is—no, this is a credit memorandum.

THE COURT: This is a credit memorandum?

MR. ROBERTS: That's right. The invoice apparently is all that we have on the Louisville.

THE COURT: Now can the Government show in that case there was any claim there were conditions on it?

MR. READ: I don't believe ar y was ever entered into, Your Honor. Wait a minute—excuse me—this is the invoice, probably there would have been a sales document in addition to this. However, I don't have it in my file, and I don't know that it would be available.

MR. ROBERTS: I think this transaction probably is the clearest one that we have, if the Court please, because we have the paid invoice, we have the credit memorandum which shows the shortage, and which we are claiming—

THE COURT: You say a paid invoice?

MR. ROBERTS: It is marked "paid," the invoice for the material.

THE COURT: You paid for it before it was delivered?

MR. ROBERTS: Well, as I understand it, all this was a credit basis, we had a long line of credit and it was charged to us, I assume.

THE COURT: Why, in this instance, was it paid

for and never was delivered, when you said in the other instances it was sent to you on credit?

MR. ROBERTS: They delivered part of it. There was four thousand pounds sold to us, and they delivered eighteen hundred nine pounds.

THE COURT: Ph, I see.

MR. ROBERTS: And gave us credit for, they came back with a credit memorandum and gave us credit for the purchase price of the eighteen hundred nine pounds which they didn't deliver.

THE COURT: I see.

MR. ROBERTS: But we are claiming that we resold it and are entitled not only to the purchase price, but to the profits.

THE COURT: Well, that is a little difficult for the Government maybe to show there was no contract there. I would like to hear from Mr. Read on that, if they paid and remitted for part of it, the Government, does the Government deny that?

MR. READ: I don't believe we were able to find documentation other than what Mr. Roberts has here. At least on the basis of the decision turning down the claim that was all the material that War Assets had shipped, and he was given a credit for that part that wasn't shipped. I don't have the documentation in my file on it.

THE COURT: All right, gentlemen, any further testimony today?

MR. READ: I would like Mr. Young to explain a little bit more, Your Honor, before we close, about the practices as far as these sales documents were concerned, when they were issued and how that worked, and as to what, if any conditions of sale were on this sales document.

THE COURT: All right, if you will go ahead along that line, I believe you went into that to some extent already. Mr. Young, if you will explain the best you can, the way that thing operated then—

A. Your Honor, the best I can recall, speaking of sales documents, only because that was the division in which I worked, only in the sales department, after the sales offering was made to prospective buyers, we got an offer to purchase, if we accepted the offer to purchase, there was a sales document made, sales document was an inter-leafed carbon form, I don't recall the number of copies we made, but the purchaser got a copy, the accounting division got a copy, the holding agency got a copy, and I don't recall what happened to the others. The property was not released by the declaring agency until they had gotten a copy of the sales document evidencing the sale of this particular property. All the sales documents carried, and the brochures, an invitation for sale, as well as I can recall, carried a standard condition that each, all the property was subject to withdrawal without notice, and without recourse.

BY MR. READ:

Q. That was in the brochure and offering?

A. Brochures and also in the invitation for sale. I believe they were on the sales document, the conditions were printed on the back of one of the copies, I don't recall which copy.

Q. Now, look here at plaintiff's exhibit number 5, you see here, conditions of sale, apparently with part of that on the back of that particular sales document. Will you state whether or not that kind of condition of sale—

A. That is a War Assets sales document, these are the conditions printed on the reverse side of the sales document, this particular sheet here is a continuation of the sales document, and all the documents were—had conditions of sale on the reverse side of it, and before it became a completed document, the selling officer had to sign it, and the purchaser had to also sign it. Then it was distributed.

Q. Well, now, state whether the property was ever shipped until a copy of that sales document was in the hands of the warehouse or whoever it was that was holding the property.

A. As far as I recall, it was the rule that no agency was to release, ship any property until they had received this copy of the sales document authorizing the release of material sold.

Q. Have you all ever looked for the, for any of the written instructions that came down from Washington headquarters of the War Assets to the various offices, have you ever looked for any of those? Do you know whether or not they would still be available?

A. Well, I don't know, but I imagine General Services have got them, if we have got them at all in Atlanta. I think all of the records were turned over to General Services record center out at East Point. I have not personally looked for any of them, no, sir, but I imagine they would be out at the record center.

Q. Aside from your written instructions, that was, would you state about that, what was the general practice?

A. Well, as I stated before, we had a central office in Washington, who controlled all the federal offices and we got instructions from the central office, how to go about these sales and documentations and collection of money, and the whole works, and they were issued and sent to each regional office, and each of the heads of the Department were given a copy of it, and would study it and were supposed to know the rules and regulations issued by the Central office in Washington. They not be in book form, but they came down as certain things came out, and new instructions.

Q. As far as the Government was concerned, until these sales, these documents were entered into, these sales agreements, would you state whether or not title ever passed?

A. Repeat that. What did you say?

Q. Until these sales documents were entered into by the party, were there actually ever a contract or a sale?

A. Not to my knowledge, not in my experience.

Q. The sales documents had to be issued first?

A. Had to be issued first.

THE COURT: Mr. Read, are you contending there were any regulations published in the--

MR. READ: In the Federal Register--,

THE COURT: That might bind the parties with notice, knowledge of it?

MR. READ: No, sir, not that I have been able to find. I am just trying to get at what actually they did, what the practice was.

THE COURT: Yes.

A. We were not allowed to make any deviation from the known instructions, I mean the instructions from the central office. If a problem came up, we had to contact the central office for authority to do something, and we never did it without their approval, and I think that is, that was the instructions to all Regional Offices.

THE COURT: Well, instructions and custom would play a part as to the probability of whether a thing was not done, but what I was trying to get at was this: internal instructions for your doing it, not known to a man on the outside, where he acted without knowledge of it, I was trying to find out if there were regulations of the department filed in the Federal Register which would charge any purchaser with knowledge.

MR. ROBERTS: I have tried to check that, Your Honor, and as far as I can find, they were never published in the Federal Register.

MR. READ: I don't think so either, Your Honor.

that was the reason I was asking him, too, about the conditions governing in this offering, that property was subject to withdrawal at any time up to the actual time of shipment.

THE COURT: Yes.

MR. READ: And he did testify, I believe, about—

THE COURT: Let me ask this question— Mr. Young, if you made a sales agreement, and then if an invoice were later made pursuant to that, would that or not indicate that it had not been withdrawn from surplus?

A. It could have been withdrawn from surplus, and the invoicing department had not been notified in sufficient time prior to sending out the invoices.

BY THE COURT:

Q. If so, it would have been an error?

A. Yes, sir.

Q. Normally you would not issue an invoice for goods which had previously been withdrawn from surplus, would you?

A. Would not.

MR. READ: That is all I wanted to ask him.

MR. ROBERTS: I would like to ask a few questions of Mr. Young.

CROSS EXAMINATION

BY MR. ROBERTS:

Q. Mr. Young, you are talking about these procedures and what you are talking about actually is the instructions that were given, not to you, but the employees generally of War Assets?

A. Well, I should say that each head of the Department was given a copy of the instructions.

Q. That's right, but I mean these instructions came down to all, and were changed quite often, were they not?

A. Changed? How do you mean? Locally or where?

Q. From Washington?

A. Oh, yes, there were changes.

Q. I mean there were changes constantly going on during the whole period of surplus?

A. They were changed.

Q. As a matter of fact, let's see, War Assets had a central office in Washington?

A. Correct.

Q. And you had certain Regional offices?

A. Correct.

Q. The Atlanta Regional Office, however, was not formed until when? '49, wasn't it, or '48?

A. I couldn't tell you the date.

Q. Where were you employed? In the Regional office?

A. Yes, I worked in the Regional Office, well, I was employed all along.

Q. I know, were you in the Regional Office here in Atlanta?

A. Yes.

Q. Do you remember when this Regional Office was established?

A. Well—

Q. Wasn't it in the fall of 1949?

A. It was prior to that.

Q. Or '48 maybe?

A. I think it was prior to that.

Q. At any rate they opened the District office.

A. I don't know the date, but I am sure, because I left September '38, and it was a Regional Office long before I left.

Q. Do you mean September, '48?

A. '48, yes, sir.

Q. Now, isn't it true that War Assets never had any firm inventory of their personal property and that it was constantly—

A. We had it firm as far as the report the reporting agency gave us, and we had an inspector to go out and inspect it, of course, you know you couldn't count things—

Q. I'm talking about as a practical matter, actually you never had

A. As far as we know it was firm from the records we had.

Q. You had a record firm inventory, but I'm talking about when you sold some goods, you didn't know actually whether you had those goods in the warehouse, all of them, or not did you?

A. No, we were supposed to have, let's put it that way.

Q. I'm talking about, as it worked out practically, you actually on lots of occasions found out you sold goods you didn't have, didn't you?

A. That is correct.

Q. From that fact, didn't it grow to be a custom that the, that the sales document wouldn't be issued until you went out to the warehouse and checked to see what you had?

A. No.

Q. You mean the sales document was issued prior to the— to that time?

A. No, no, sir, I don't. I mean to say that when the property was declared to War Assets, inspectors went out to see if it was there, and get the best description they could, then it was offered for sale, the sales document was a completion of an acceptance of an offer to buy.

Q. Let me ask you this, didn't you, you issued offerings such as this catalog, didn't you?

A. That is correct.

Q. And you got bids then on the basis—

A. Got offers.

Q. Got offers then?

A. Yes, that's correct.

Q. And you sent out letters accepting them, didn't you?

A. Not necessarily, no, sir.

Q. I'm not talking about necessarily, but on occasion, didn't you accept these offers by letter?

A. I never did.

Q. Well, I'm talking about War Assets generally.

A. Well, I couldn't answer that.

Q. I thought that's what you were testifying to, as to what War Assets did generally.

A. Generally I would say, no, we did not sell it by letter; by sales documents.

Q. I'll hand you Defendant's Exhibit number 8, which is a series of letters, and ask you if that wasn't a common practice in War Assets to accept offers in that fashion?

A. This, as I see it, is a mimeographed form letter advising you that the property you made an offer to purchase has tentatively been accepted.

Q. Does it say tentatively?

A. No, sir.

Q. That's what I'm talking about.

A. The acceptance of the document.

Q. It doesn't say tentatively, does it?

A. No, sir.

Q. It says it has been received?

A. The way this reads, this is a mimeographed form put out by that particular office, no standard form at all.

Q. So what you are testifying, Mr. Young, is what happened in this office where you worked, isn't it?

A. That's right.

Q. You don't know what happened in Detroit?

A. No.

Q. Or Louisville?

A. No.

Q. Actually you were not in an operating office, in a regional office, were you?

A. Yes, I was in the Atlanta Regional Office.

Q. Didn't they have an Atlanta District Office also?

A. Before they made it a regional office, yes.

Q. Do you mean the Regional Office was an operating office prior to 1948?

A. I believe it was.

Q. Were you employed in the District Office?

A. No, sir, I was in the Atlanta Regional Office.

Q. You never were in the Atlanta District Office?

A. No, sir, unless it was known as the District Office.

BY THE COURT:

Q. Did I understand you to say in some of these offices they would first take inventory, and then they would send out information that they had certain material on hand and get offers, was that sent out from the Regional Offices of what office would send that information out?

A. It depended on what office was designated to handle the sale.

Q. Suppose—

A. A Regional Office was the control of all the District Offices, let's put it this way, some district offices made sales of their own, but all the records were sent to the Regional Office, and then finally sent—

Q. There was a Regional Office in Atlanta?

A. Yes, sir.

Q. Then there were District Offices under that?

A. Yes, sir.

Q. Who would, which office would look in the warehouse and find out what they had and send out these—

A. That depended on where the property was located. If it was in the boundaries of the District Office, some personnel of that District out—went out and verified it.

Q. Before they advertised to sell it, they first found out that they had it, is that correct?

A. Yes.

Q. And when somebody found out that they had it, who sent out the notice? The regional, District, or both?

A. Both. It could be both.

Q. I see. But before they advertised it, they first found out they had it on hand?

A. Yes.

Q. But after advertising it, before somebody could get there to buy it, they conceivably might have sold it to somebody else, is that right?

A. Ask me that again.

Q. If they go out there today, and have a certain quantity on hand, and they advertise it, what I'm trying to get at is, I am assuming it to be subject to prior sale, if somebody comes in and wants to buy it, and they have already sold it, of course they couldn't sell it to the last man, could they?

A. No, sir.

Q. But you were, they would not enter up a sales agreement until they first checked up and found out that he had it available, is that right? You wouldn't enter into a sales agreement with a concern to sell them something unless you knew you had it on hand?

A. To the best of my knowledge we try to find out if it was actually there.

Q. You tried to?

A. Yes. Of course there were so many things you can never account for, get an actual accounting, to go out and see the standard conditions of whether it was

good, fair, or poor, or what not, whether it was actually supposed to be there, we did our best to do it.

THE COURT: All right.

BY MR. ROBERTS:

Q. You say, Mr. Young, your brochures and everything always had these standard conditions of sale. I'll hand you Defendant's Exhibit number 4, and ask you where they are in there.

A. I didn't—I don't believe I said that they always had the standard conditions, this is a brochure offer, just offering for sale, listing of property, these are the general information apparently made in here.

Q. There are no standard—

A. I'll say most of them did give the conditions of sale in the invitation for sale, or the brochure. Apparently this one did not.

Q. Didn't the conditions of sale vary from time to time, during the course of War Assets?

A. Yes, to the best of my knowledge, they did.

Q. And didn't it, you were in the Regional Office, didn't it have supervision over the District Offices in this region, to some extent, the Regional Office?

A. Yes, it did have supervision.

Q. Each District office was under a District Director?

A. I believe that is, I believe they were under some kind of Director.

Q. Didn't the sales policies and sales procedure for

personal property vary in the various District Offices to an extent?

MR. READ: Unless he was in a bunch of them; I doubt if he would be able—

MR. ROBERTS: He said he had supervised them in sales.

A. I supervised—

Q. The District Office?

A. I never said that, that I know of.

Q. I asked you if as Regional Representative of personal property sales, you didn't supervise the sales in the offices in this region?

A. I misunderstood your question. What I meant to say, and what I was, I was the Chief of the Textile Wearing Apparel Division of the Atlanta Office.

Q. So, so you had no supervision over District Offices?

A. No, only in the Atlanta office.

Q. And you didn't go into any of the other District Offices?

A. Not unless I was sent out. I was sent out once or twice on city sales merely to help in the administrative work.

Q. You are not familiar in this procedure in any office except in Atlanta, is that right?

A. Well, that is correct.

Q. And you wouldn't attempt to say that the other

offices followed these procedures you have been testifying to?

A. I would say—

Q. I'm talking about of your own knowledge?

A. No, I couldn't swear that, and—

Q. And you don't know whether or not the procedure on metals was different from those on textile or not, do you?

A. I would think they were different.

Q. Isn't it true that metals were in very scarce supply at that time?

A. That was my understanding.

Q. And that the eligible buyers were very limited, that is, you just couldn't go out and sell it generally?

A. That is correct. That is my understanding.

Q. Isn't it true that, generally speaking, the offices didn't follow this technical procedures that you did in textiles, as to the sale of those materials?

A. Well, I don't know how to answer that question.

Q. Well, isn't it true that they followed different procedures?

A. They certainly, had certain things in their procedure, that other divisions didn't have in theirs, but the over-all, general policy was the same, as far as the standard conditions of sale were concerned.

Q. Do you know whether or not the people who were

selling metals entered into a great number of negotiations, to contract for the sale of it?

A. I believe they did enter into some negotiations, but they, they had special reasons which I am not familiar with.

Q. But you do know that they did enter into negotiated sales?

A. Oh special occasions where there were instructions.

Q. I believe that is all, Your Honor.

MR. READ: Come down, Mr. Young.

(Whereupon the witness was excused from the stand.)

MR. READ: I have nothing further, Your Honor.

THE COURT: Gentlemen, I'll ask defense counsel to write out in little short separately numbered paragraphs, the essential facts, and this is more in the nature of enumerating the evidence than it is the conclusions ultimately. But I would like a little brief summary of what the evidence shows on all of these matters, broken down by these different offices here.

MR. ROBERTS: If Your Honor please, I'll be very glad to do that, I would like to get a copy of the record before I do it, so I won't have to be depending on my memory. We have gone over a pretty long period of time, and I am really afraid to trust my memory on the oral testimony at this stage, although I have made some notes on it.

(Colloquy between counsel and court off the record.)

THE COURT: What are the issues the Government claims they actually delivered, or sold, and didn't get paid for?

MR. READ: The Government's claim, Your Honor?

THE COURT: Yes, you have got a denial of the Government credit they are claiming, then you have got the other—

MR. ROBERTS: I think the first pre-trial order very clearly sets that out.

MR. READ: I think both pre-trial orders did take care of that.

MR. ROBERTS: Count 1, this is pre-trial order, March 5, the first pre-trial order. (Reads) (Whereupon the hearing was concluded at this point, with instructions by the court as to filing briefs on the evidence.)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

I, Velma M. Setzer, Official Reporter of the United States District Court, Northern District of Georgia, do hereby certify that the foregoing 278 pages contain a true, full, correct and complete transcript of proceedings had before the said court held in the city of Atlanta, Georgia, in the matter therein stated.

In testimony whereof, I hereunto set my hand on this the 30th day of December, 1954.

VELMA M. SETZER,
Official Court Reporter.

Filed in Clerk's office Jan. 25, 1955.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

THE UNITED STATES versus ASSOCIATED METALS & ALUMINUM COMPANY	C. A. 4294

BEFORE: Honorable Frank A. Hooper, Judge, April 16, 1956.

APPEARANCES

FOR THE UNITED STATES,
CHARLES D. READ, *Asst. U. S. Atty.*

FOR THE DEFENDANTS,
JAMES M. ROBERTS, *Attorney.*

THE COURT: All right, gentlemen.

MR. READ: Your Honor, since there has been no judgment in this court, we will leave it in the discretion of the Court that the Court consider in evidence the two guaranty agreements, one executed the 22nd of March, 1946, David Center, Robert Robbins, and Joseph Benamy, three of the defendants herein, and also on the 8th of October, 1946, by Joseph Benamy. Now, they both were the unconditional guaranties, and they provided that the persons signing as guarantors should have

no right of recourse against the Government upon failure of the Government to deliver any aluminum purchased by the purchaser. It also provided that the Government might proceed directly against the guarantor upon default of the purchasers under any of the sales of aluminum to the purchasers. Our position, and I believe it to be correct, that the effect of these guaranty agreements would be to knock out the claims of set-off set up by these defendants, at least as to those signing these two guaranty agreements. I regret, Your Honor, that they were not presented at the other hearing that we had in these cases. As Your Honor knows, there was a very large volume of documents involved, and just because of the details involved, and the large number of documents we didn't really discover the significance of these documents until later. It was admitted, it was alleged in the complaint and admitted, I believe, that the defendants S. P. and Joseph Benamy guaranteed payment to the Government on the purchase of the aluminum. I have copies of these two guaranty agreements that I would like to offer in evidence. I think Mr. Roberts has copies.

THE COURT: Any objection?

MR. ROBERTS: Yes, sir, we object to them on two grounds. One is that the evidence is closed, and Your Honor made your findings although they have not been put in final form, the findings have been made, and it is too late to offer them. Second, they are irrelevant and immaterial to the issues in the case, because they are purely and simply a waiver as guarantors and certainly the guarantors are not liable for anything that the principal is not liable for, this has no effect on the

principal's right of set-off, and the principal's right of set-off is good, then the guarantors are not liable for it anyway. The pleadings admit that these guarantors are liable for anything that the principals are. We say there is no relevance of materiality to these two documents, in addition to the fact they are too late in offering them.

THE COURT: Let me see the documents again. Mr. Read, are you making new parties here? Are these men who guaranteed this thing party to the case?

MR. READ: Yes, sir, Your Honor, they are.

MR. ROBERTS: They were made parties and guarantors, Your Honor, and admitted their liabilities, assuming that the principal was liable.

THE COURT: Does this add anything to that?

MR. ROBERTS: It doesn't add or subtract as far as I can see.

MR. READ: We believe there are several cases that would indicate, since they are unconditional guarantors, Your Honor, that would have a right to go against them, even without going against the principal, that in effect this is a surety agreement, rather than a guaranty agreement, and they have waived any right of recourse against the Government for the failure to deliver any aluminum purchased which is the basis of the claim of set-off that have been made by the defendants, that is, all the defendants.

THE COURT: Well, now, do I take it it is stipulated between the parties that if Associated Metals and Aluminum Company is liable—I believe that is a partnership, isn't it?

MR. ROBERTS: Yes, sir.

MR. READ: Yes, sir.

THE COURT: If that partnership is liable, then these two men—

MR. ROBERTS: The guarantors are liable, if the partnership is liable.

THE COURT: —who signed this exhibit—

MR. ROBERTS: Yes, sir.

THE COURT: —which you are tendering, are liable?

MR. ROBERTS: They are liable if the partnership is liable, yes, sir.

THE COURT: Mr. Read, I don't see how you need this paper, that is all asked for anyway, isn't it?

MR. READ: No, sir, we believe the agreement in there precludes the guarantors at least from setting up the defense and precludes them from having any credit on the claim set off, since they expressly in their agreement here, say that they agree that they will have no right of recourse against the Government for failure to deliver any aluminum, and since the agreement in effect makes them principals.

THE COURT: I am going to reject this on the ground it comes too late. This suit has been pending for years and years, and years, I have been doing my utmost to get it terminated. I don't think I want to admit any new issues, I have already made my findings, and I reject it on that ground alone.

MR. ROBRTS: If Your Honor please, I have present a conclusion of facts and laws based on the facts Your Honor gave me, I extend this to Your Honor at this time.

THE COURT: All right, sir.

MR. READ: Could we have this exhibit marked, just, of course it is ruled out.

THE CLERK: U. S. Exhibit for identification 8, dated April 16, 19.....

MR. READ: They are certified and they are put together, both are put under the same identification, Exhibit A.

THE COURT: What is that? Do you have another paper there?

MR. READ: This is the same document, just for the purpose of the record, I want—

THE COURT: Which one of these findings of fact and conclusions of law as prepared by Mr. Roberts do you differ with, Mr. Read?

MR. READ: Your Honor, I had not had an opportunity to go over this, I don't imagine with any, although I am in a position of not being able to agree of course with Mr. Roberts' proposed findings. We did go over the things, and as Your Honor, directed, we tried—

THE COURT: I'll take any of them you don't object to as being expressly agreed to, so I suggest you study them now or a little bit later.

MR. ROBERTS: I might suggest I believe there is a blank for the date from which the interest will run, and I think Mr. Read and I can get together on the date, and we will give it to you.

THE COURT: If you want some time to study it, I'll put the matter over, and let you go into it.

MR. READ: I would like to.

THE COURT: I tell you frankly, gentlemen, this is a case we would like some help on, but we got to this point, and I want to see what is left in the case. All right, sir, I'll put it over for another hearing, at which time I believe I'll let you make just a little, whatever you want to, Mr. Read, just write me a letter and say which of these findings you agree to, and which ones you disagree to.

MR. READ: All right, Your Honor, I'll also have some drawn up. However, I gave effect in there to the document which I offered, and of course, in a fairly short time I can re-do it, if Your Honor would like to have that.

THE COURT: I am going to let you within ten days from now, file your objections to his findings. Then I will let him, within ten days, file his objections to your findings. Then I will take it all, and decide it.

MR. READ: All right, sir.

MR. ROBERTS: In the meantime we will agree on a date for that interest to begin.

THE COURT: All right, gentlemen, that's all.

(Whereupon the hearing was concluded.)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

I, Velma M. Setzer, Official Reporter of the United States District Court for the Northern District of Georgia, do hereby certify that the foregoing 6 pages contain a true, full, correct and complete transcript of proceedings had before the said court held in the city of Atlanta, Georgia, in the matter therein stated.

In testimony whereof I hereunto set my hand on this the 21st day of September, 1956.

VELMA M. SETZER,
Official Court Reporter.

Filed in Clerk's Office Sept. 21, 1956.

FINDINGS OF THE COURT

This is an action by the United States of America against defendants seeking to recover for sales of surplus properties by the War Assets Administration to Associated Aluminum & Metals Co., a copartnership composed of two general partners, David Center and Robert Robbins. Defendants have filed claims of set-off against the United States arising out of alleged breaches of contract by the United States in failing to make deliveries in instances where defendants allege the War Assets Administration had given definite commitments to Associated Metals. Findings will be made separately below as to the various counts of the United States complaint, and also in regard to the Claims of Set-off filed by defendants.

Count One

1. In this count the Government seeks to recover $101.10 representing the difference between freight on the material described when shipped in carload lots of 30,000 pounds minimum, and when shipped in less than carload lots. Plaintiff's Exhibit No. 1 evidences the agreement between the parties and specifies "Shipping Instructions 30,000 pound cars to 971 Peachtree unless otherwise specified by us." Paragraph 9 of Page 2 of Plaintiff's Exhibit No. 2 provides: "All sales are subject to sales conditions of War Assets Administration." The last sentence of Paragraph E on Page 6 of Plaintiff's Exhibit No. 2, sam : being Conditions of Sale, provides: "Seller will not ship the property to more than one destination except in cases where such separate shipments each constitute a carload, truckload, or a minimum if established by W.A.A." Pursuant to the bid of Associated

Metals, plaintiff shipped the material to said bidder in less than carload lots, and said bidder never specified to plaintiff shipments of less than carload lots. None of the lots of said material located at one location amounted to 30,000 pounds. Acceptance of the bid of Associated Metals with the above-quoted provision signify an understanding between the parties that said bidder should receive only carload lots, the freight upon the same of course, being on that basis. The shipments in less than carload lots were entirely upon the initiative of the Government and therefore the Government cannot recover this additional freight.

Count Two

2. This count was abandoned by the Government.

Count Three

3. This count is admitted by defendants and the sum of $27,967.90 became due to Plaintiff as of January 24, 1947, the last date shown in the complaint in Paragraph 11 under the Third Count, and interest at the rate of 7% per annum accrues as of said date, on the principal amount remaining after set-off credits as hereinafter set forth.

Count Four

4. This count is admitted by defendants in the sum of $3,528.77, which became due thirty days after the sale date of February 5, 1947, that is on March 7, 1947, and interest at the rate of 7% per annum accrues as of said date.

DEFENDANTS' CLAIM OF SETOFF, PARAGRAPH 11

5. On various dates in 1946 Associated Metals purchased from Plaintiff's Detroit Office of the War Assets

Administration 122,976 pounds of material for a total purchase price of $25,939.67. The various dates are set forth in Defendants' Exhibit No. 9 and the amounts and other details are set forth in Defendants' Exhibit No. 1, both of which exhibits are expressly referred to and made a part hereof.

6. The fair market value of said material at the time of the failure of Plaintiff to deliver same was $35,187.08, and as a result of the failure of Plaintiff to deliver said material to Defendants they were damaged in the sum of $9,247.41. This credit is the total of credits of various dates, but Defendants' counsel has stipulated that it may all be credited as of July 24, 1946. Associated Metals filed claims for this damage with the Claims Division of the War Assets Administration, which were processed by the said Claims Division and finally denied on September 23, 1949.

DEFENDANTS' CLAIM OF SETOFF, PARAGRAPH 12

7. Defendants' claim damages in the sum of $22,154.02, this being the alleged difference between the price of $84,658.64 which the War Assets Administration agreed to sell 410,795 pounds of aluminum to Associated Metals, and the sum of $106,812.66, the price at which Associated Metals claim to have resold such aluminum in anticipation of delivery by the Government. See Defendants' Exhibit No. 2, made a part hereof. Of 541,745 pounds of aluminum claimed to have been purchased by Associated Metals on February 22, 1946, from the Government in California, over 130,000 pounds were later delivered by various shipments. These shipments appear to have been made however under different and separate agreements from the one claimed by defendants to have

taken place for the purchase of 410,795 pounds of aluminum. (See Transcript Pages 17, 124 and 125 and Plaintiff's Exhibits 8 through 18).

8. In support of the claimed contract for the purchase of 541,745 pounds of aluminum from the Government Defendants introduced a brochure offering the material for sale (Defendants' Exhibit No. 4), a written offer by agents of Associated Metals to purchase certain materials, (Defendants' Exhibit No. 6), copy of a letter to War Assets Administration confirming the offer on the part of their agents, (Defendants' Exhibit No. 12), a number of letters of acceptance from War Assets Administration to Associated Metals, and its agents, (Defendants' Exhibit No. 8), testimony of James McGee Johnson, Defendants' agent, testimony of I. T. Cohen, testimony of Attorney Morris Lavine, and testimony of Defendant Robbins that he had received a letter on the same form as those composing Defendants' Exhibit No. 8, accepting Associated Metals offer to purchase the material involved.

9. The Court finds that the price at which Associated Metals had resold the goods was the fair market value at the time. See Defendants' Exhibit No. 2.

10. Defendants did not establish with any clarity or definiteness, the existence or contents of the written acceptance of the bid to purchase 541,745 pounds of aluminum which they claimed. Defendants did not prove a valid contract and are not entitled to the credit claimed in this paragraph.

11. Assuming the Court should be held in error as to Finding of Fact No. 10, and should it appear that there

was a contract, as claimed by Defendants, the Court finds:

That there was a novation in the terms of the original contract as to the dates on which deliveries were made, and pursuant to such novation, the Government made partial deliveries over a period of time and then refused to make further deliveries. The court finds the statute of limitations would then run from the time of such refusal to make further deliveries, same being within the six year period of limitations.

DEFENDANTS' CLAIM OF SETOFF, PARAGRAPH 13

12. The Court finds that Associated Metals purchased from the War Assets Administration the eight lots of merchandise set forth in Defendants' Exhibit No. 19, and that Associated Metals gave shipping instructions as to four of these lots and they were delivered. The items not delivered were those for 10,000 pounds, 1,113 pounds, 2,457 pounds and 1,426 pounds.

13. Defendants' claim is based upon failure to deliver these four lots above mentioned to Associated Metals, Defendants claiming the purchase price of said four lots agreed upon was $3,138.66, and that the market price of same at the time and place in question was $4,673.27, making a loss of $1,534.63. The Court finds that the loss to Defendants would be in the amount claimed above under the evidence, however, Defendant's Exhibit No. 19 provided that Defendants should "forward shipping instructions." The Court finds Defendants have not carried the burden of showing that Defendants did give shipping instructions concerning the four items complained of, and on that question the evidence is evenly balanced, it being just as reasonable to suppose that they

were ordered out as it is to suppose that they were not. There being no proof of shipping instructions, the Court finds that none were given, and finds that Defendants are not entitled to credit as claimed.

DEFENDANTS' CLAIM OF SETOFF, PARAGRAPH 14

14. Associated Metals agreed for the purchase of 4,000 pounds of material from the Government, and of this amount 1,809 pounds were shipped, leaving 2,191 pounds not shipped. See Defendants' Exhibits 15 and 16.

15. The evidence does not show that these goods or materials were ever withdrawn from sale by the War Assets Administration, or by any Agency of the Government. The Court finds that the purchase price of the materials which Plaintiff failed to deliver was $517.08, and that the fair market value of said material at the time of such failure to deliver was $832.58, resulting in a loss to Associated Metals of $315.50, for which amount Defendants are credited herein.

DEFENDANTS' CLAIM OF SETOFF, PARAGRAPH 15

16. On March 18, 1946, the War Assets Administration delivered to Associated Metals certain material, as set out in Defendants' Exhibits Nos. 10, 13 and 14. The claim set up in this paragraph deals with a transaction with the Atlanta Office of War Assets Administration. Associated Metals accepted the shipment involved, sold it to a customer, and in connection therewith incurred certain expense of hauling, loading and uncrating the same for resale. See Defendants' Exhibit No. 13. The Court finds that acceptance of the shipment made by the Government in lieu of Associated Metals' order was a waiver by defendants of any breach. The Court further

finds that the claim of setoff involved in this paragraph did not accrue within six years next preceding the filing of this claim of setoff. There is no entitlement to any credit claimed in this paragraph.

17. Claims were filed with the Claims Division of War Assets Administration for all the claims set forth in Defendants' Claims of Setoff and were all finally denied by said Claims Division.

CONCLUSIONS OF LAW

1. Plaintiff is not entitled to recover on First and Second Counts of Complaint.

2. Plaintiff is entitled to recover of Defendants, jointly and severally, the sum of $27,967.90 on the Third Count of the Complaint and Defendants are entitled to a credit on this amount of $9,247.41 under Paragraph 11 of their Claim of Setoff and $315.50 under Paragraph 14 of their Claim of Setoff, or a total credit of $9,562.91.

3. Plaintiff is therefore entitled to a net recovery of $18,404.99 on the Third Count of the Complaint, with interest at the rate of 7% thereon, from January 24, 1947.

4. Plaintiff is entitled to recover of Defendants herein, jointly and severally, the sum of $3,528.77 on the Fourth Count of the Complaint, with interest at the rate of 7% from March 7, 1947.

5. Defendants are not entitled to setoff against the amounts owed Plaintiff in the sum of $22,154.02 as set forth in Paragraph 12 of their Claim of Setoff. Defendants did not prove a valid and binding contract.

6. The Claim of Setoff of Defendants as set forth in Paragraph 12 of their counter-claim is not barred by the statute of limitations.

7. Defendants are not entitled to the setoff claimed in Paragraph 13 of their Claim of Setoff, Defendants not having carried the burden of showing that they gave shipping instructions concerning the items complained of.

8. Defendants are not entitled to a setoff against the amounts owed Plaintiff in the sum of $344.12 as set forth in Paragraph 15 of their Claim of Setoff. Acceptance of the shipment made by the Government in lieu of Defendants' order and proceeding to resell same to customers, amounted to a waiver of any breach, by Defendants. Further, the claim of setoff set forth in this paragraph is barred by the statute of limitations set forth in 28 U.S.C., Section 2401, said claim not having been filed within six years next preceding the accrual of same.

9. The failure to file claims with the General Accounting Office as provided by Title 28 U.S.C.A., Section 2406 was not fatal to the claims of setoff allowed herein, since claims on all were filed with the Claims Division of the War Assets Administration and denied.

The Court holds that the Act of Congress, known as the "Federal Property and Administrative Services Act of 1949," in Section 204 of the same, sustains the position of Defendants that War Assets Administration had authority to investigate and pass upon these claims by Defendants against the Government arising out of the sales in question. The above statute will be found in

the United States Congressional Service, 81st Congress, 1st Session 1949, page 383. Section 204 (c) thereof provides that any Federal Agency disposing of surplus property may deposit in a special account with the United States Treasurer such amount of the proceeds as it deems necessary to permit appropriate refunds to purchasers when any disposition is rescinded, or does not become final, or payments for breach of any warranty, and may withdraw therefrom amounts so to be refunded or paid, without regard to the origin of the funds withdrawn. Section 204 (f) of such Act, which the Court considers is controlling in this case, provides the following:

> "(f) Where credit has been extended in connection with any disposition of surplus property under this title or by War Assets Administration (or its predecessor agencies) under the Surplus Property Act of 1944, or where such disposition has been by lease or permit, the Administrator shall administer and manage such credit, lease, or permit, and any security therefor, and may enforce, adjust, and settle any right of the Government with respect thereto in such manner and upon such terms as he deems in the best interest of the Government."

In the case at hand credit was extended by War Assets Administration to Defendants in connection with the disposition of surplus property. Under the above statute the Administrator was given express authority to "administer and manage such credit, . . . *and enforce, adjust, and settle any right of the Government with respect thereto, in such manner and upon such terms as it deemed in the best interest of the Government.*" (Italics mine.)

It seems the acts of the Government in connection with

these claims of Defendants constitute a recognition by the Government itself of the rights of War Assets Administration to accept or reject Defendants' claims and to negative the contention of the Government that Defendants were relegated to making a claim of credits upon the General Accounting Office. In the case at bar Defendants made their claims against War Assets Administration and the latter denied the claims upon their merits, contending among other things, that Defendants would not be permitted to recover lost profits of resale.

In this connection it is appropriate to state that this Court does not consider all of the credits herein allowed to defendants to be in the nature of recoupments. There would seem to be little doubt about the right of Defendants to plead and prove recoupments. It is true that some of the claims of Defendants allowed by this Court do represent in a sense profits lost upon a resale. However, it appears from the evidence that after Defendants had obtained from War Assets Administration definite commitments on specific articles at specified prices, Defendants then gave commitments to their customers to resell the same and consequently, when War Assets Administration failed or refused to make delivery, defendants were compelled to go into the open market in order to supply their customers, and therefore, suffered a definite financial loss.

This Court is of the opinion that the above statute enacted in 1949 was designated to create a special fund which could be used by the War Assets Administrator for settling and adjusting with purchasers any and all disputes that might arise between the Administration and such purchasers. To give the statute a more narrow

interpretation would create more difficulties than those which the statute laid at rest.

Let judgment be presented in accordance with these Findings of Fact and Conclusions of Law.

This 14th day of May, 1956.

FRANK A. HOOPER,
United States District Judge.

Filed in Clerk's Office
May 14, 1956.

F. L. BEERS, Clerk

By: J. L. MOORE,
Deputy Clerk.

JUDGMENT

In accordance with findings of fact and conclusions of law entered by this Court on May 14, 1956, it is hereby

CONSIDERED, ORDERED and ADJUDGED that Plaintiff, United States of America, do have and recover of the above-named defendants, jointly and severally, the principal sum of $21,933.76, interest in the sum of $14,279.12 to May 15, 1956, plus future interest at the rate of 7% per annum, and costs of this action.

This 16th day of May, 1956.

FRANK A. HOOPER,
United States District Judge.

Presented by:

CHARLES D. READ, JR.,
Assistant U. S. Attorney.

Filed in Clerk's Office
May 16, 1956.

F. L. BEERS, Clerk.

By: J. L. MOORE,
Deputy Clerk.

Recorded Vol. 106, Page 618.

NOTICE OF APPEAL TO THE COURT OF APPEALS UNDER RULE 73(b).

Notice is hereby given the United States of America, Plaintiff above-named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the judgment entered in this action on May 16, 1956.

This 11th day of July, 1956.

/s/ JAMES W. DORSEY,
United States Attorney.

/s/ CHARLES D. READ, JR.,
Assistant U. S. Attorney
Attorneys for Appellant,
United States of America,
402 Old Post Office Bldg.
Atlanta, Georgia.

Filed in Clerk's Office
July 11, 1956.

F. L. BEERS, Clerk.

By: J. L. MOORE,
Deputy Clerk.

NOTICE OF APPEAL

Notice is hereby given that David Center, Robert Robbins, Associated Aluminum & Metals Company, also known as Associated Metals and as Associated Metals Company, a copartnership consisting of David Center and Robert Robbins, S. P. Benamy, Joseph Benamy, Shower Door Company of America, a Georgia corporation, and Shower Door Company of America, Limited, a partnership consisting of Robert Robbins as general partner and other persons as limited partners, defendants above named, appeal to the Court of Appeals for the Fifth Circuit from the judgment entered in this action on the 16th day of May, 1956 in favor of the plaintiff, United States of America, and against said defendants in the sum of $21,933.76 as principal; $14,279.12 interest to date of judgment, besides future interest and costs.

This 12th day of July, 1956.

COHEN, ROBERTS & KOHLER,

By: JAMES M. ROBERTS,
Attorneys for Defendants,
Appellants.
1310 First National Bank Bldg.
Atlanta, Georgia.

Filed in Clerk's Office
July 12, 1956.

F. E. BEERS, Clerk.

By: J. L. MOORE, Deputy Clerk.

ORDER EXTENDING TIME TO DOCKET APPEAL

Upon stipulation of the parties, it appearing to the Court that Notice of Appeal on behalf of Plaintiff was filed on July 11, 1956, and Notice of Appeal on behalf of Defendants was filed on July 12, 1956, it is

ORDERED, CONSIDERED and ADJUDGED that time for filing and docketing the record on appeal in the United States Court of Appeals for the Fifth Circuit be, and same is hereby extended for the full ninety days provided by Rule 73 (g), that is up to and including October 9, 1956.

This 20th day of August, 1956.

BOYD SLOAN,
United States District Judge.

Filed in Clerk's Office
August 20, 1956.
F. L. BEERS, Clerk
By: J. L. MOORE,
Deputy Clerk.

Recorded Vol. 107, Page 465.

Stipulated:

JAMES W. DORSEY,
United States Attorney.

CHARLES D. READ, JR.,
Assistant U. S. Attorney,
Attorney for Plaintiff.

COHEN, ROBERTS AND KOHLER,
Attorneys for Defendants.

STATEMENT OF POINTS

The points upon which appellants intend to rely on this appeal are as follows:

1. The Court erred, as a matter of law, in finding as a matter of fact in finding of fact No. 10, that the "defendants did not establish with any clarity or definiteness, the existence or contents of the written acceptance of the bid to purchase 541,745 pounds of aluminum which they claimed."

2. The Court erred, as a matter of law, in finding as a matter of fact in finding of fact No. 10, that the "defendants did not prove a valid contract and are not entitled to the credit claimed in this paragraph."

3. The Court erred, as a matter of law, in holding in conclusion of law No. 5, that the "defendants are not entitled to setoff against the amounts owed plaintiff in the sum of $22,154.02 as set forth in Paragraph 12 of their Claim of Setoff. Defendants did not prove a valid and binding contract."

4. The Court erred in not finding that there was a valid contract between plaintiff and defendants and that the defendants were entitled to a setoff against the plaintiffs' claims in the sum of $22,154.02.

5. The Court erred in granting judgment against the defendants in any amount because the undisputed evidence proved a contract, the breach thereof by plaintiff and damages in excess of the plaintiff's claim.

This Statement of Points is served and filed by defendants-appellants pursuant to Rule 75 (d) of the Federal Rules of Civil Procedure.

JAMES M. ROBERTS,
Attorney for Defendants-Appellants.
1310 First National Bank Building,
Atlanta, Georgia.

Certificate of service omitted.

Filed in Clerk's Office
September 11, 1956

F. L. BEERS, Clerk

By: J. L. MOORE, Deputy Clerk

DESIGNATION OF RECORD ON APPEAL

Appellants, David Center, Robert Robbins, Associated Aluminum & Metals Company, a copartnership consisting of David Center and Robert Robbins, S. P. Benamy, Joseph Benamy, Shower Door Company of America, a Georgia corporation and Shower Door Company of America, Limited, a partnership consisting of Robert Robbins as general partner and other persons as limited partners, designate the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. Complaint.

2. Answer of defendants to complaint.

3. Reply of plaintiff to answer of defendants.

4. Amendment to reply of plaintiff to answer of defendants allowed by Court on June 8, 1954.

5. Amendment to reply of plaintiff to answer of defendants allowed by Court on March 12, 1956.

6. Pre-trial order dated March 5, 1953.

7. Pre-trial order dated April 20, 1953.

8. The entire transcript of the evidence, a copy of which is filed herewith.

9. The following documentary evidence introduced by plaintiff:

(a) Plaintiff's exhibits numbers eight through eighteen inclusive.

10. The following documentary evidence introduced by defendants:

(a) Defendants' exhibits numbers two, four, six, eight, eleven, twelve, twenty-four, twenty-five and twenty-six.

11. Findings of fact and conclusions of law filed May 14, 1956.

12. Judgment of Court entered May 16, 1956.

13. Notice of Appeal filed July 12, 1956.

14. Order extending time to docket appeal entered August 20, 1956.

15. Statement of points on which appellants intend to rely, served herewith.

16. This designation.

JAMES M. ROBERTS,
Attorney for Appellants.
1310 First National Bank Building,
Atlanta, Georgia.

Certificate of service omitted.

Filed in Clerk's Office Sept. 11, 1956.

F. L. BEERS, Clerk

By: J. L. MOORE, Deputy Clerk.

CROSS DESIGNATION OF RECORD ON APPEAL

Appellant, United States of America, cross-designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. Notice of Appeal filed July 11, 1956.

2. Transcript of hearing on April 16, 1956, copy of which is on record with the Court.

3. All other portions of the record and documentary evidence not designated by defendants.

4. This Cross Designation.

This 21st day of September, 1956.

JAMES W. DORSEY,
United States Attorney.

CHARLES D. READ, JR.,
Assistant U. S. Attorney,
Attorneys for Appellant,
United States of America.

Certificate of service omitted.

Filed Sept. 21, 1956.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

UNITED STATES OF AMERICA Vs. DAVID CENTER, ET AL.	CIVIL ACTION 4294

ORDER FORWARDING ORIGINAL PHYSICAL EXHIBITS

It being made appear to the Court that all of the original physical exhibits admitted in evidence have been designated as part of the record on appeal in the above stated case, and that they are of such form that they cannot be conveniently copied, it is therefore

ORDERED that all of such exhibits be forwarded to the United States Court of Appeals for the Fifth Circuit along with the transcript of the record in lieu of copies thereof.

This 25th day of September, 1956.

FRANK A. HOOPER,
United States District Judge.

Filed in Clerk's Office Sept. 25, 1956.

F. L. BEERS, Clerk.

By: J. L. MOORE, Deputy Clerk.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA
NORTHERN DISTRICT OF GEORGIA | SS:

I, F. L. Beers, Clerk of the United States District Court in and for the Northern District of Georgia, do hereby certify that the foregoing and attached 336 pages contain a true, full, complete and correct copy of the original record and all proceedings (except all original physical exhibits admitted in evidence) in the matter of

UNITED STATES OF AMERICA
Vs.
DAVID CENTER, ET AL
CIVIL ACTION 4294

as specified in the designations of contents of record herein and as the same remains of record and on file in the Clerk's Office of the said District Court at Atlanta, Georgia.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of the said District Court at Atlanta, Georgia, this 25th day of September, A. D., 1956.

F. L. BEERS, Clerk,
United States District Court,
Northern District of Georgia.

By: J. L. MOORE, Deputy Clerk.

No. 183

FILED
AUG 1 4 1957
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1957

DAVID CENTER, ET AL.

Petitioners

versus

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BEN KOHLER, JR.
1310 First National Bank Bldg.
Atlanta 3, Georgia
Attorney for Petitioners

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NO.

DAVID CENTER, ROBERT ROBBINS,
ASSOCIATED ALUMINUM & METALS COMPANY,
ALSO KNOWN AS
ASSOCIATED METALS AND AS
ASSOCIATED METALS COMPANY,
A COPARTNERSHIP CONSISTING OF
DAVID CENTER AND ROBERT ROBBINS,
S. P. BENAMY
JOSEPH BENAMY
SHOWER DOOR COMPANY OF AMERICA,
A GEORGIA CORPORATION,
SHOWER DOOR COMPANY OF AMERICA,
A PARTNERSHIP, CONSISTING OF
ROBERT ROBBINS AS GENERAL PARTNER
AND OTHER PERSONS AS
LIMITED PARTNERS

Petitioners

versus

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in the above case on May 1, 1957.

OPINIONS BELOW

The District Court for the Northern District of Georgia rendered no opinion in this case. Its findings of fact and conclusions of law are found in the record at pages 302 through 312. The opinion of the Court of Appeals for the Fifth Circuit (R-325-332) is reported at 244 F. 2d. 207.

JURISDICTION

The judgments of the Court of Appeals for the Fifth Circuit were made and entered on May 1, 1957 (R-333) and the order of the Court of Appeals for the Fifth Circuit which denied the petition for rehearing was made and entered on May 29, 1957 (R-341). Copies of the judgment and the order are appended to this petition in the Appendix at pp 14. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Respondents filed suit against petitioners for certain sums due it under an open account for materials purchased from War Assets Administration. Petitioners filed counterclaims based on damages for breach of contract. The District Court gave judgment for the respondent on its entire claim but allowed a portion of petitioners' counterclaim and denied a portion of their counterclaim. The Circuit Court of Appeals affirmed the disallowance of the counter claims of petitioners and reversed that part of the District Court's judgment allowing a

portion of petitioners' counterclaim with direction to enter judgment for the respondent as to these counterclaims. The sole question presented is:

Whether it was necessary for petitioners to present their claims to the General Accounting Office as required by U. S. C. A. 28-2406, ever. though War Assets Administration had a statutory claims procedure and the claims had been presented to the Claims Division of War Assets Administration and denied by it.

STATUTES INVOLVED

The pertinent portions of 28 U.S.C.A. 2406; Section 30, Subsections (c) and (e) of the Surplus Property Act of 1944; and Section 204, Subsections (d) and (g) of the Federal Property and Administrative Services Act of 1949, (40 U.S.C.A. 485) are set forth in the appendix at pp 15-16

STATEMENT

We will state only the facts which bear on the question presented. In 1946 and 1947 petitioners, having established a $100,000.00 line of credit with War Assets Administration, made contracts with various offices of this agency for various quantities of aluminum. Some deliveries were made but other sales alleged to have been made were cancelled by respondent. The petitioners claimed they were damaged by these cancellations to the extent of the difference between the contract price and the market value at the time of the breach.

Respondent brought suit against petitioners for $31,496.67 which admittedly was owed. Petitioners counterclaimed for $33,251.56 under four separate claims. The trial Court found for petitioner in the amount of

$9,247.41 on one claim and $315.50 on another and found against them on two claims amounting to $22,154.02 and $1,534.63 respectively. Both petitioners and respondent appealed to the Circuit Court which passed on only one question, holding that respondents had not filed their claims with the General Accounting Office and therefore were not entitled to recover on any of their counterclaims. It therefore affirmed the trial Court on its finding for respondent, reversed the trial Court on its findings for petitioners and directed the trial Court to give judgment for respondent without any reduction because of petitioners' counterclaims.

The Court of Appeals held that the case of Skinner & Eddy Corp. v. McCarl, Comptroller General, 275 U.S. 1, had no application in the instant case and held that Section 204 of the Federal Property and Administrative Services Act of 1949, 40 U.S.C.A. 485, Subsections (d) and (g), did not authorize the payment of a claim such as those made by petitioners. One of the reasons given for the latter holding was that the Federal Property and Administrative Services Act of 1949 was prospective and would not apply to transactions made in 1946. On their petition for rehearing petitioners called the attention of the Court of Appeals to Section 30, Subsections (c) and (e) of the Surplus Property Act of 1944 which contained almost the same provisions but the petition for rehearing was denied without comment.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below should be reviewed because it has decided an important question of Federal law which has not been settled by this Court, unless this Court decided the question in the case of

Skinner & Eddy Corp. v. McCarl, Comptroller General, as petitioners contend. If that case did decide the question then the Circuit Court decided the case erroneously. Petitioners respectfully submit that the question is an important one of Federal Administration and should be settled by this Court.

2. It is vitally important to the public generally to know definitely whether or not, when dealing with a Federal Administrative Agency which has set up a procedure for handling claims, a person must go through the claims procedure of that agency and then before his claim can be adjudicated in a Court he must also go through a further administrative claim procedure with the General Accounting Office.

3. The question presented by this case is of great and recurring significance in the administration of any Federal agency with the power to contract. The serious implications of the decision below in relation to public dealings with Federal agencies make the case an appropriate one for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Ben Kohler, Jr.

BEN KOHLER, JR.
1310 First National Bank Bldg.
Atlanta 3, Georgia
Counsel For Petitioners.

APPENDIX TO PETITION FOR CERTIORARI

OPINION OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 16314

UNITED STATES OF AMERICA,
Appellant-Appellee,

versus

DAVID CENTER, ET AL,
Appellees-Appellants.
(AND REVERSE TITLE)

Appeals from the United States District Court for the Northern District of Georgia

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(May 1, 1957)

Before HUTCHESON, Chief Judge, and TUTTLE and JONES, Circuit Judges.

TUTTLE, Circuit Judge: The United States appeals from a judgment of the trial court sitting without a jury in a suit brought by it for the recovery of a balance

alleged to be due from the sale of aluminum products by the War Assets Administration. The basis of the Government's appeal is that the trial court allowed a reduction in the amount of the Government's recovery by reason of two alleged breaches of other contracts by which the War Assets Administration agreed to sell additional aluminum which it later refused to deliver.

The defendants in the trial court also appeal by cross-bill from a denial of the trial court of their claim of damages from the breach of additional alleged contracts to sell aluminum which the War Assets Administration thereafter withdrew from sale.

Numerous interesting questions of Government contracting procedures and remedies for the breach of contracts of sale by Government agencies are presented by the respective briefs of the parties. In the view we take of the matter, however, only one of these questions need be resolved—that is when the Government sues for the balance due on a contract of sale may the defendant set off against the admitted purchase price a claim which had not previously been presented to and disallowed by the General Accounting Office.[1]

Concluding as we do that this question must be answered in the negative, it is not necessary for us to consider the other points raised by the appeal and cross-appeal.

[1] "§2406. Credits in actions by United States; prior disallowance.

In an action by the United States against an individual, evidence supporting the defendant's claim for a credit shall not be admitted unless he first proves that such claim has been disallowed, in whole or in part, by the General Accounting Office, or that he has, at the time of the trial, obtained possession of vouchers not previously procurable and has been prevented from presenting such claim to the General Accounting Office by absence from the United States or unavoidable accident. June 25, 1948, c.646, 62 Stat. 972." 28 U.S.C.A. §2406.

Only the facts necessary to an understanding of the court's conclusion on this controlling question need be stated.

During the years 1946 and 1947 appellees in the principal appeal, whom we shall hereafter speak of as defendants, made contracts with various offices of the War Assets Administration, under which they purchased various quantities of aluminum, having previously established a credit of $100,000 with the Administration. Some deliveries were made but other sales alleged by defendants to have been made were cancelled. The defendants contend as to the cancelled sales that they were damaged by the refusal of the Administration to make deliveries at the contract price, to the extent of the difference between the contract price and the market value at the time of the breach.

This litigation was commenced by the filing of a suit by the United States seeking a recovery (after the abandonment of one item) of $31,496.67. The defendants claimed damages under their set-offs of $33,251.56, representing four separate classes of claims. Of these the trial court found in their favor to the extent of $9,247.41 on one set of claims, and $315.50 on another, rejecting their claims of $22,154.02 and $1,534.63, on the ground of a failure of proof to support them. The Government contends that the court erred in allowing the two items because it is admitted by defendants that no claims were filed with the General Accounting Office, and the defendants contend that the court erred in not finding in their favor with respect to the two items disallowed.

As we have previously stated, we do not consider it necessary to pass upon the question as to whether the

trial court had jurisdiction to entertain a set-off or counter-claim of the sort here asserted as to the item of $22,154.02, this being in excess of the jurisdictional amount of $10,000 for which an original suit could be filed by defendants against the United States under the Tucker Act, 28 U.S.C.A. §2406.[2] Nor need we pass upon the question as to whether there was sufficient evidence of the execution of a contract for the sale of the aluminum, the alleged breach of which gave rise to the $22,154.02 claim, nor whether such claim, if originally valid, was barred by the six year statute of limitations.

The trial court, discussing the requirement of section 2406 that before evidence supporting the defendant's claim for a credit can be admitted he must first prove that such claim has been disallowed by the General Accounting Office, held that the filing of a claim with the War Assets Administration satisfied this requirement. The court based this conclusion on the provisions of section 204 of the Federal Property & Administrative Services

[2]On this issue it might be questionable whether a district court could entertain jurisdiction to pass on such a claim even to the extent of allowing it up to the jurisdictional amount of $10,000. Thompson Foundry & Machine Co. v. United States (M.D.Ga.), 67 F.Supp. 121; Pioneer Gen-E-Motor Corp. v. Department of the Army and United States of America (N.D.Ill.), 135 F.Supp. 879. But the Supreme Court in its opinion in Natl. City Bank of New York v. Republic of China, et al, 348 U.S. 356, 365, stated: "An American . . . could counterclaim—to the extent of the Government's claim—in a suit by the United States in any court, 28 U.S.C. §2406; . . . "; however, the precise question as to the construction of §2406 was not before the Court in the National City Bank case.

Act of 1949, 40 U.S.C.A. §485; referring particularly to subsections (d) and (g) thereof.[3]

Having in mind the precise nature of the claims here asserted by the defendants—that is claims for damages for lost profits for a breach of a contract of sale, we think it quite clear that nothing in this statute gives to the General Services Administrator the power to allow such claims and withdraw federal funds for the payment of such claims. In light of the express requirement of Section 2406 that such claim be presented to the General Accounting Office, something more than the limited authority of another agency of the Government to make refunds to purchasers on the rescission of a sale or the settlement of any right of the Government with respect to a credit where credit has been extended must be found to create an exception to its requirements. Moreover, it is not at all plain that even the powers granted under sub-section (d) as to refunds to purchasers would be operative as to transactions concluded several years before the enactment of the Property Management Act, since the authorization for the creation of the special

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[3] "Special account deposits

"(d) Any Federal agency disposing of surplus property under this subchapter (1) may deposit, in a special account with the Treasurer of the United States, such amount of the proceeds of such dispositions as it deems necessary to permit appropriate refunds to purchasers when any disposition is rescinded or does not become final, or payments for breach of any warranty, and (2) may withdraw therefrom amounts so to be refunded or paid, without regard to the origin of the funds withdrawn.

. . . .

"Management of credit, leases, and permits on property

"(g) Where credit has been extended in connection with any disposition of surplus property under this subchapter or by War Assets Administration (or its predecessor agencies) under the Surplus Property Act of 1944, or where such disposition has been by lease or permit, the Administrator shall administer and manage such credit, lease, or permit, and any security therefor, and may enforce, adjust, and settle any right of the Government with respect thereto in such manner and upon such terms as he deems in the best interest of the Government."

40 U.S.C.A. §485 (d), (g), 63 Stat. 388, as amended, 68 Stat. 1051 (formerly 40 U.S.C. §485 (c), (f)).

account is prospective by its terms and there is no indication that there was any such fund from which claims for refunds resulting from 1946 transactions could be paid, even if the authority to make such payment as to future transactions and rescissions was granted by sub-section (d).

It is apparent that the authority to make *refunds* refers to the repayment of the purchase price received from vendees in case the sale is later rescinded or any warranties that had been made in its connection had been breached. This is quite different from authority to settle an unliquidated claim for damages for lost profits where a breach of a contract of sale is involved on which the purchaser had not yet made any payments to the Government.

As to sub-section (g), it seems clear that the authorization there was to permit the Administrator to settle the claims of the United States arising out of credits authorized under the War Assets Administration's operation, but not to make payments on claims for breach of contracts asserted by debtors of the Government.

There is nothing in *Skinner & Eddy Corp., v. McCarl, Comptroller General,* 275 U.S. 1, that would authorize a holding that the submission of a claim either to the War Assets Administration or to the General Services Administrator would satisfy the requirements of section 2406.

There are numerous cases applying this statute. See in this Circuit *Fitzsimmons v. United States,* 54 Fed. 812, and see 3 Moore, Federal Practice ¶13.26 at 67, 68, and cases there cited. The only exceptions called to our attention or which we have been able to find from the rigid

requirements of Section 2406 are in instances in which legislation authorizes the adjustment and payment of the claims of the nature here asserted by an independent government corporation or other agency. Cf. *Skinner & Eddy Corp. v. McCarl, Comptroller General, supra,* and *United States v. Paddock* (5 Cir.), 187 F. 2d 271. Obviously if an agency of the Government has no power to allow the claim there is no reason for permitting a submission to it to satisfy the requirement that it be submitted to the General Accounting Office. A careful review of the action by the War Assets Administration and the General Services Administration in this very case clearly indicates that these Government agencies declined consideration of the breach of contract claims because they had no funds out of which such damage claims could be paid. Thus the final denial of the $22,251.02 claim stated: "The claim appears to be solely for loss of anticipated profits and it is well settled that claims for anticipated profits which are in the nature of claims for unliquidated damages for breach of contract may not be paid or adjusted under appropriations, in the absence of specific provision therefor in the appropriation."

Similar language was used in the rejection of the claim for $9,247.41 relating to the Detroit transaction and of the claim for $1,534.63, which the trial court found was not supported by the evidence. This supports our construction of the provisions of 40 U.S.C.A. §485 (d) above, it appearing that no special fund or deposit had been authorized for the disposition of unliquidated claims for breach of contract under the Surplus Property Act of 1944, and nothing in sub-section (d) itself created such fund or granted such authority. Congress has therefor not authorized any exception here to the requirement

that any counter-claim or set-off of the nature of an unliquidated claim for damages for breach of contract must first be submitted to the General Accounting Office and be disallowed before being available to reduce the amount of the Government's claim.

The two groups of claims allowed by the trial court, both having been unliquidated claims for damages for breach of contract, and not having been presented to the General Accounting Office for its action, were improperly allowed as credits against the claim of the United States. The two other groups of claims disallowed by the court being subject to the same infirmity, the trial court did not err in not allowing them. The judgment is affirmed to the extent that it permitted recovery by the United States and is reversed to the extent that it reduced the Government's claim by the defendants' cross-claims.

The case is remanded for entry of judgment in accord with this opinion.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit
New Orleans, Louisiana

JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JUDGMENT

Extract from the Minutes of May 1, 1957.

UNITED STATES OF AMERICA,

No. 16314

versus

DAVID CENTER, ET AL.,
(AND REVERSE TITLE)

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, to the extent that it permitted recovery by the United States; and that said judgment be, and it is hereby, reversed to the extent that it reduced the Government's claim by the defendants' cross-claim; and that this cause be, and it is hereby, remanded to the said District Court for entry of judgment in accordance with the opinion of this Court.

TITLE 28, SECTION 2406, U.S.C.A.:

"Section 2406. Credits in actions by United States; prior disallowance.

In an action by the United States against an individual, evidence supporting the defendant's claim for a credit shall not be admitted unless he first proves that such claim has been disallowed, in whole or in part, by the General Accounting Office, or that he has, at the time of trial, obtained possession of vouchers not previously procurable and has been prevented from presenting such claim to the General Accounting Office by absence from the United States or unavoidable accident." June 25, 1948, c.646, 62 Stat. 972."

Subsections (d) and (g) of Title 40 U.S.C.A. Section 485, 63 Stat. 388, as amended, 68 Stat. 1051, (formerly 40 U.S.C. Section 485 (c), (f)):

"SPECIAL ACCOUNT DEPOSITS"

"(d) Any Federal agency disposing of surplus property under this subchapter (1) may deposit, in a special account with the Treasurer of the United States, such amount of the proceeds of such dispositions as it deems necessary to permit appropriate refunds to purchasers when any disposition is rescinded or does not become final, or payments for breach of any warranty, and (2) may withdraw therefrom amounts to be refunded or paid, without regard to the origin of the funds withdrawn."

"MANAGEMENT OF CREDIT, LEASES AND PERMITS ON PROPERTY"

"(g) Where credit has been extended in connection with any disposition of surplus property under this sub-

chapter or by War Assets Administration (or its predecessor agencies) under the Surplus Property Act of 1944, or where such disposition has been by lease or permit, the Administrator shall administer and manage such credit, lease or permit, and any security therefor, and may enforce, adjust, and settle any right of the Government with respect thereto in such manner and upon such terms as he deems in the best interest of the government."

Subsections (c) and (e) of Section 30 of the Surplus Property Act of 1944, 58 Stat. 765, (formerly Title 50 App. 968 et. seq.).

"(c) To the extent authorized by the Board, any Government agency disposing of property under this Act (1) may deposit, in a special account with the Treasurer of the United States, such amount of the proceeds of such dispositions as it deems necessary to permit appropriate refunds to purchasers when any disposition is rescinded or does not become final, or payments for breach of any warranty, and (2) may withdraw therefrom amounts so as to be refunded or paid, without regard to the origin of the funds withdrawn."

"(e) Where the disposal agency acquires or retains any mortgage, lien or other interest as security in connection with any transfer or disposition or property under this Act, the disposal agency shall retain, preserve and manage such security and may enforce and settle any right of the Government with respect thereto, in such manner and upon such terms as it deems in the best interest of the Government. The Board may prescribe regulations to govern the exercise of the authority granted under this subsection."

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No. 383

In the Supreme Court of the United States

OCTOBER TERM, 1957

DAVID CENTER, ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
WILLIAM HENRY HOUK,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (Pet. App. 6–13) is reported at 244 F. 2d 207. The findings of fact and conclusions of law entered by the District Court (R. 302–312) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 1, 1957 (Pet. App. 14). A timely petition for rehearing (R. 334–6) was denied on May 29, 1957 (R. 341). The petition for a writ of certiorari was filed on August 19, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the court below properly held that petitioners' failure first to present their claims to the General Accounting Office precluded their allowance under 28 U. S. C. 2406 as counterclaims against the Government in a suit brought by the United States against petitioners.

STATUTES INVOLVED

28 U. S. C. 2406 provides:

> In an action by the United States against an individual, evidence supporting the defendant's claim for a credit shall not be admitted unless he first proves that such claim has been disallowed, in whole or in part, by the General Accounting Office, or that he has, at the time of the trial, obtained possession of vouchers not previously procurable and has been prevented from presenting such claim to the General Accounting Office by absence from the United States or unavoidable accident.

Subsections (d) and (g)[1] of Section 204 of the Federal Property and Administrative Services Act of 1949 (63 Stat. 389, as amended, 40 U. S. C. 485) provide in pertinent part:

> (d) Any Federal agency disposing of surplus property under this title (1) may deposit, in a special account with the Treasurer of the United States, such amount of the proceeds of such dispositions as it deems necessary to per-

[1] These subsections, originally (c) and (f), were redenominated as (d) and (g) when a new subsection (b) was added as of August 31, 1954 (68 Stat. 1051, 40 U. S. C. 485).

mit appropriate refunds to purchasers when any disposition is rescinded or does not become final, or payments for breach of any warranty, and (2) may withdraw therefrom amounts so to be refunded or paid, without regard to the origin of the funds withdrawn.

* * * * *

(g) Where credit has been extended in connection with any disposition of surplus property under this title or by War Assets Administration (or its predecessor agencies) under the Surplus Property Act of 1944, or where such disposition has been by lease or permit, the Administrator shall administer and manage such credit, lease, or permit, and any security therefor, and may enforce, adjust, and settle any right of the Government with respect thereto in such manner and upon such terms as he deems in the best interest of the Government.

STATEMENT

On March 7, 1952, the Government filed suit seeking to collect moneys due and owing from petitioners in connection with the disposal of aluminum scrap (R. 1–6). The complaint contained counts for $101.10, $27,967.90 ($38,531.65 less admitted credits), $3,528.77, and another which was abandoned prior to trial (R. 1–6, 26, 31, 303). Petitioners contested liability only as to the $101.10 count (R. 25–26, 31–32, 303), but interposed as counterclaims five "setoff claims" totalling $33,251.56, also arising from surplus aluminum disposal transactions.

The District Court ruled against petitioners on all but two of the counterclaims, and, as to those two, the

court held the claims to be meritorious and assertion thereof not barred by petitioners' failure to comply with 28 U. S. C. 2406. The District Court held that the failure to file the claims with the General Accounting Office, as provided by 28 U. S. C. 2406, "was not fatal" since the claims were filed with the Claims Division of War Assets Administration and "denied * * * upon their merits" (R. 309–312). The court said that Section 204 of the Federal Property and Administrative Services Act of 1949 (40 U. S. C. 485, pp. 2–3, *supra*) authorized the agency disposing of surplus property to settle claims administratively, and that the claims were filed with and denied by the War Assets Administration's Claims Division (*ibid.*).

Both parties appealed (R. 314–315). The court below reversed, holding that Section 204 of the Federal Property and Administrative Services Act of 1949 did not vest jurisdiction in the surplus disposal agency to pass on claims for unliquidated damages for breach of contract such as are here involved, and, consequently, petitioners' failure to submit their claims to the General Accounting Office precluded their assertion here as counterclaims (Pet. App. 7, 13).

ARGUMENT

Contrary to petitioners' claim, the holding of the Court of Appeals, that in the particular circumstances of this case the submission of petitioners' counterclaims to the Comptroller General was a prerequisite to their subsequent assertion, is not inconsistent with *Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1, the case principally relied on by petitioners (see Pet. 4–6).

Indeed, the decision below is fully consistent with the guiding principles there formulated. Accordingly, there is no need for further review by this Court.

1. In *Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1, the petitioner had presented to the Comptroller General for allowance certain claims arising from contracts with the United States Shipping Board Emergency Fleet Corporation, apparently so as to enable the petitioner to assert them as a credit should the United States sue on the contracts as threatened. See R. S. 951, former 28 U. S. C. 774 (1940 ed.), from which 28 U. S. C. 2406 is derived.[2] Upon the Comptroller General's refusal to consider the claims on the ground that the duty and the power to consider the claims was vested in the United States Shipping Board, rather than him, the petitioner sought mandamus to compel the Comptroller to pass upon the claims. In affirming the dismissal of the writ, this Court, while reading R. S. 951 as precluding the interposition of a claim as a credit unless previously disallowed by an accounting officer of the Government authorized to settle and adjust the claims, ruled that the Comptroller General had no authority to pass on the claim in the particular circumstances since (1) the Fleet Corporation was a private corporation whose financial transactions were not passed upon by the General Accounting Office, and (2) the Shipping Board was authorized to "adjust, settle, and liquidate all matters arising out of or incident to the exercise * * * of

[2] Provisions of the so-called "credits" act of March 3, 1797, c. 20, 1 Stat. 514–515, are the origin of R. S. 951.

any of the powers or duties conferred or imposed" by the provisions of law under which the contracts had been made. 275 U.S. at 10.

The court below meticulously followed *Skinner & Eddy* here. Since the War Assets Administration, and its successor, General Services Administration, are agencies within the Executive branch of the Government subject to financial supervision by the Comptroller General, the Court of Appeals undertook to ascertain whether Congress had authorized them to settle and adjust claims arising from surplus property disposal of the type on which petitioners sought recovery.[3] Inasmuch as the pertinent language of Section 204 of the Federal Property and Administrative Services Act of 1949, pp. 2–3, *supra*, does not contain a broad authority comparable to that in *Skinner & Eddy*, the court below had to determine whether the claims came within the authority provided by Section 204. Since "the precise nature of the claims" were "for damages for lost profits for a breach of a contract of sale" (Pet. App. 10), the court correctly held that they were not within the "limited authority" conferred by subsection (d) to make "refunds to purchasers when any disposition is rescinded

[3] In this connection, the court below noted that: "The only exceptions * * * [to] the rigid requirements of section 2406 are in instances in which legislation authorizes the adjustment and payment of the claims * * * by an independent government corporation or other agency. * * * Obviously if an agency of the Government has no power to allow the claim there is no reason for permitting a submission to it to satisfy the requirement that it be submitted to the General Accounting Office." [Pet. App. 11–12.]

or does not become final, or payments for breach of any warranty" (*ibid.*). The court further noted (Pet. App. 11):

> It is apparent that the authority to make *refunds* refers to the repayment of the purchase price received from vendees in case the sale is later rescinded or any warranties that had been made in its connection had been breached. This is quite different from authority to settle an unliquidated claim for damages for lost profits where a breach of a contract of sale is involved on which the purchaser had not yet made any payments to the Government.

Similarly, the Court of Appeals correctly read subsection (g) as "authorization * * * to permit the Administrator to settle the claims of the United States arising out of credits authorized under the War Assets Administration's operation, but not to make payments on claims for breach of contracts asserted by debtors of the Government." (Pet. App. 11.)

Thus, since, as the court below said, Section 204 (d) of the 1949 Act did not create a special fund or deposit "for the disposition of unliquidated claims for breach of contract * * * and nothing in [it] * * * itself created such fund or granted such authority * * *,"[4] the Court of Appeals properly con-

[4] This reading of Section 204 (d) is buttressed, as the court pointed out (Pet. App. 12), by the administrative construction given by WAA and GSA to its authority when denying the claims. See Defendant's Exhibits 18, 20, 23, 24 and 25. And while this reading of the administrative rejection is at odds with that of the District Court, the court below was at liberty to disregard the trial court's conclusion since the perti-

cluded that "Congress has therefore not authorized any exception here to the requirement that any counterclaim or set-off of the nature of an unliquidated claim for damages for breach of contract must first be submitted to the General Accounting Office and be disallowed before being available to reduce the amount of the Government's claim." (Pet. App. 12–13.)

2. The purported procedural dilemma pressed upon this Court by petitioners (Pet. 5) is at best contrived. If there were any question as to whether a particular Government agency, other than the Comptroller General, has authority to settle and adjust specific categories of claims, then the claimant could easily file his claim with both, and, if both disclaimed jurisdiction, the claimant could thereafter in a suit by the United States assert full compliance with 28 U. S. C. 2406 (cf. *Skinner & Eddy* v. *McCarl*, 275 U. S. at 4). But there is in fact no such dilemma here, for GSA in 1949 advised petitioners that their claims had been dis-

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nent materials relevant thereto are wholly documentary. *Orvis* v. *Higgins*, 180 F. 2d 537, 539, n. 6 (C. A. 2), certiorari denied, 340 U. S. 810; see also 5 Moore's *Federal Practice* (2nd ed.), par. 52.04; cf. *United States* v. *Gypsum Co.*, 333 U. S. 364, 395.

In this connection, it may also be noted that petitioners' suggestion that the court below erred (Pet. 4) in concluding that subsection (d) "is prospective by its terms" (Pet. 10–11) is of little consequence. While it would appear that subsections (c) and (e) of Section 30 of the Surplus Property Act of 1944 (58 Stat. 782, former 50 U. S. C. App. 1639 (c) and (e), Appendix, p. 10, *infra*), give exactly the same authority as Sections 204 (d) and (g) of the later 1949 Act, this circumstance, if true, does not destroy the primary basis for the Court of Appeals' ruling.

allowed because of lack of authority to adjust and settle them (see Pet. App. 11), and at that time petitioners still had an ample opportunity to file their claims with the Comptroller General, since ten years is allowed for the filing of such claims. 31 U. S. C. 71a and 237. Indeed, petitioners could have complied with 28 U. S. C. 2406 even after suit had been filed. *United States* v. *Hawkins*, 10 Pet. 125.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
MELVIN RICHTER,
JOSEPH LANGBART,
Attorneys.

SEPTEMBER 1957.

APPENDIX

Subsections (c) and (e) of Section 30 of the Surplus Property Act of 1944 (58 Stat. 782, former 50 U. S. C. App. 1639 (c) and (e) (1946 ed.)), which were repealed when the Federal Property and Administrative Services Act of 1949 was enacted (63 Stat. 389), provided:

> (c) To the extent authorized by the Board, any Government agency disposing of property under this Act (1) may deposit, in a special account with the Treasurer of the United States, such amount of the proceeds of such dispositions as it deems necessary to permit appropriate refunds to purchasers when any disposition is rescinded or does not become final, or payments for breach of any warranty, and (2) may withdraw therefrom amounts so to be refunded or paid, without regard to the origin of the funds withdrawn.
>
> * * * * *
>
> (e) Where the disposal agency acquires or retains any mortgage, lien, or other interest as security in connection with any transfer or disposition or [sic] property under this Act, the disposal agency shall retain, preserve, and manage such security and may enforce and settle any right of the Government with respect thereto in such manner and upon such terms as it deems in the best interest of the Government. The Board may prescribe regulations to govern the exercise of the authority granted under this subsection.

U. S. GOVERNMENT PRINTING OFFICE: 1957